92-1721

No. _____

Supreme Court, U.S.
FILED
APR 22 1993
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

EDNA HARRIS,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 22, 1993

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

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EDNA HARRIS,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Edna Harris hereby requests this Court to issue a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on December 8, 1992.

OPINIONS BELOW

The order and judgment and the order entered by the United States Court of Appeals for the Tenth Circuit are included in the Appendix at 1a and 10a, respectively.

The order of dismissal of certain defendants, the order dismissing certain claims, and the order denying motion for sanctions and dismissing action entered by the United States District Court for the District of Colorado are included in the Appendix at 12a, 14a, and 16a respectively. The reporter's transcript of the bench ruling at the

hearing on motions to dismiss and the reporter's transcript of the hearing on motion for partial summary judgment in the United States District Court for the District of Colorado are included in the Appendix at 21a and 25a, respectively.

JURISDICTION

The date of the entry of the order and judgment sought to be reviewed is December 8, 1992.

The date of the order respecting a rehearing is January 22, 1993.

Jurisdiction of this Court to review the order and judgment in question by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981

42 U.S.C. § 1985

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Edna Harris is a Black citizen of the United States who was employed as a licensed practical nurse at Presbyterian/Saint Luke's Medical Center in Denver, Colorado from July 13, 1981 to September 24, 1985. On December 10, 1984, Ms. Harris filed a charge of racial discrimination against her employer with the United States Equal Employment Opportunity Commission because of a December 7, 1984 incident in which a nurse manager by the name of Jeanne Coakley Beethe falsely accused Ms. Harris of engaging in conduct detrimental to the welfare, safety, convenience or comfort of a patient. Ms. Beethe suspended Ms. Harris from her job for three days without pay, even though Presbyterian/Saint Luke's Medical Center employee policies and procedures required progressive discipline to be applied in this situation. On January 25, 1985, Ms. Beethe filed two complaints against Ms. Harris with the Colorado Board of Nursing, one complaint

involving the December 7, 1984 incident, and the other complaint involving a January 4, 1985 incident in which Ms. Beethe again falsely accused Ms. Harris of engaging in conduct detrimental to the welfare, safety, convenience, or comfort of patients. On May 25, 1985, the Colorado Civil Rights Division found probable cause to believe that Ms. Harris' charge of racial discrimination is true. In July of 1985, Ms. Beethe gave Ms. Harris the only below average performance rating received by her during her employment at Presbyterian/Saint Luke's Medical Center. On August 26, 1985, Ms. Harris filed suit in the United States District Court for the District of Colorado against Presbyterian/Saint Luke's Medical Center and Jeanne Coakley Beethe for racial discrimination and retaliation under 42 U.S.C. § 1981.

After the assets of Presbyterian/Saint Luke's Medical Center were sold to American Medical International, Inc. on September 24, 1985, Ms. Harris continued to be employed with American Medical International, Inc. until June of 1988, when a nurse manager by the name of Shirley Hoffman falsely accused Ms. Harris of threatening to retaliate against patients, and then terminated Ms. Harris from her employment after receiving approval from Walter Weisman, David Gore, and other management officials at American Medical International, Inc. Ms. Harris later learned that David Gore had written a March 28, 1988 memorandum falsely accusing her of writing an anonymous letter criticizing Shirley Hoffman's dress and personal appearance. The memorandum referred to Ms. Harris as a "disgruntled employee" who had received a letter of final warning for insubordinate behavior directed toward Shirley Hoffman, and who had "a rather long history of dissatisfaction with her employment," including "a discrimination suit she initiated against P/SL and her former nurse manager, which is pending since 1985, and allegations made by a Park Manor patient who suggested that Mrs. Harris was physically abusive to her at one point." The memorandum then said: "Due to the nature of this action on Mrs. Harris' part I will be conferring with Wallie George seeking concurrence with his department toward effecting Mrs. Harris termination of employment." Copies of the memorandum were sent to Walter George, Shirley Hoffman, and other management officials at American Medical International, Inc.

B. PROCEDURAL BACKGROUND

This case was filed in the United States District Court for the District of Colorado on May 1, 1990, United States District Judge Zita L. Weinshienk presiding. In her amended complaint, plaintiff Edna Harris alleged claims against defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman, Presbyterian/Saint Luke's Medical Center, and Jeanne Coakley Beethe under 42 U.S.C. § 1985(3), and claims against defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman under 42 U.S.C. § 1981. Ms. Harris invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331 and 1343, and demanded a trial by jury for all claims alleged in the amended complaint.

On September 19, 1990, Judge Weinshienk held a hearing on the motion to dismiss filed by defendants Presbyterian/Saint Luke's Medical Center and Jeanne Coakley Beethe and dismissed "with prejudice" Ms. Harris' § 1985(3) claims against these defendants on the ground that Ms. Harris' amended complaint failed to allege that any overt act in furtherance of the object of the conspiracy was committed by these defendants. Judge Weinshienk dismissed Ms. Harris' § 1985(3) claims against defendants Presbyterian/Saint Luke's Medical Center and Jeanne Coakley Beethe even though no discovery had been conducted in the case (a Rule 16 scheduling order had not even been entered).

On January 29, 1991, Judge Weinshienk held a hearing on the motion for partial summary judgment filed by defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman; struck sua sponte the evidentiary materials submitted by Ms. Harris in opposition to the motion for partial summary judgment filed by these defendants on the ground that Ms. Harris' evidentiary materials had not been filed within 72 hours before the scheduled hearing on the motion for partial summary judgment;[1] and dismissed Ms. Harris' § 1985(3) claims against these

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[1]The following evidentiary materials were submitted by Ms. Harris in opposition to the motion for partial summary judgment filed by defendants American Medical International, Inc., Walter Weisman,

defendants on the ground that an intracorporate conspiracy is not actionable under § 1985(3). Judge Weinshienk dismissed Ms. Harris' § 1985(3) claims against these defendants without ruling on Ms. Harris' Rule 56(f) affidavit requesting additional time to complete discovery.[2]

Walter George, David Gore, and Shirley Hoffman: (a) Deposition of Walter L. George as designated representative for American Medical International, Inc. (Volumes I and II); (b) Deposition of David Gore; and, (c) Ms. Harris' deposition exhibits (Volumes I and II).

[2]In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986), this Court qualified the requirement set forth in Fed. R. Civ. P. 56(e) that, when a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial":

> This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

In the present case, the affidavits submitted by defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman in support of their motion for partial summary judgment failed to meet the initial burden of production of a moving party on a motion for summary judgment, and Ms. Harris was entitled to prevail on defendants' motion for partial summary judgment without submitting any evidentiary materials in response. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970). However, because Judge Weinshienk dismissed Ms. Harris' § 1985(3) claims against these defendants without ruling on Ms. Harris' Rule 56(f) affidavit requesting additional time to complete discovery, Ms. Harris was also not given the opportunity to discover information that is essential to her opposition to the motion for partial summary judgment filed by these defendants.

On September 9, 1991, Judge Weinshienk dismissed sua sponte "with prejudice" Ms. Harris' remaining § 1981 claims against defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman on the ground that a claim of discriminatory or retaliatory discharge from employment is not actionable under § 1981, and denied Ms. Harris' request to reinstate Ms. Harris' § 1985(3) claims against these defendants as an appropriate sanction for withholding the March 28, 1988 memorandum from discovery by Ms. Harris until after Ms. Harris' § 1985(3) claims against these defendants had been dismissed by Judge Weinshienk. In dismissing Ms. Harris' remaining § 1981 claims against these defendants, Judge Weinshienk refused to consider the evidentiary materials tendered by Ms. Harris in opposition to the motion for partial summary judgment filed by these defendants, and refused to consider the evidentiary materials tendered by Ms. Harris in response to Judge Weinshienk's May 17, 1991 request for briefs from the parties "analyzing the effect on this case of the recent opinions of the United States Court of Appeals for the Tenth Circuit, Trujillo v. Grand Junction Regional Center, 928 F.2d 973 (10th Cir. 1991), and Carter v. Sedgwick County, 929 F.2d 1501 (10th Cir. 1991), in which the Tenth Circuit held that discriminatory discharge is not actionable under 42 U.S.C. § 1981."[3]

On October 9, 1991, Ms. Harris filed her notice of appeal to the United States Court of Appeals for the Tenth Circuit of Judge Weinshienk's September 19, 1990, January 29, 1991, and September 9, 1991 dismissals of Ms. Harris' claims under §§ 1985(3) and 1981, and Judge Weinshienk's September 9, 1991 denial of Ms. Harris' request to reinstate Ms. Harris' § 1985(3) claims against defendants American Medical International, Inc., Walter Weisman, Walter

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[3]The following evidentiary materials were tendered by Ms. Harris in response to Judge Weinshienk's May 17, 1991 request for briefs from the parties: (a) Deposition of Edna Harris; (b) Deposition of Shirley Hoffman; (c) Deposition of Michael Ratkiewicz; (d) Deposition of Thomas Sawicki; (e) Ms. Harris' answer to interrogatory re: racial discrimination ordered by United States Magistrate Judge Richard M. Borchers; and, (f) American Medical International, Inc.'s supplemental response to Ms. Harris' first set of interrogatories.

George, David Gore, and Shirley Hoffman as an appropriate sanction for withholding the March 28, 1988 memorandum from discovery by Ms. Harris until after Ms. Harris' § 1985(3) claims against these defendants had been dismissed by Judge Weinshienk.

On December 8, 1992, United States Circuit Judge John P. Moore entered on behalf of the panel hearing Ms. Harris' appeal his unpublished order and judgment affirming, without oral argument, Judge Weinshienk's dismissals of Ms. Harris' claims under §§ 1981 and 1985(3), and Judge Weinshienk's denial of Ms. Harris' request to reinstate Ms. Harris' § 1985(3) claims against defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman as an appropriate sanction for withholding the March 28, 1988 memorandum from discovery by Ms. Harris until after Ms. Harris' § 1985(3) claims against these defendants had been dismissed by Judge Weinshienk. In affirming Judge Weinshienk's dismissals of Ms. Harris' claims under §§ 1981 and 1985(3), Judge Moore refused to consider the evidentiary materials submitted by Ms. Harris on appeal.[4]

On January 22, 1993, the court of appeals denied Ms. Harris' petition for rehearing and suggestion for rehearing en banc. No reasons were given for the denial.

ARGUMENT

In Lessman v. McCormick, 591 F.2d 605, 611-12 (10th Cir. 1979), the court of appeals established the following law of the circuit:

> In many cases of conspiracy essential information can only be produced through discovery, and the parties should not be thrown out of court before being given an opportunity through that process to ascertain whether the linkage they

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[4]The evidentiary materials submitted by Ms. Harris on appeal were the same as those submitted by Ms. Harris in opposition to the motion for partial summary judgment filed by defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman, and those tendered by Ms. Harris in response to Judge Weinshienk's May 17, 1991 request for briefs from the parties.

think may exist actually does. Considering a somewhat analogous complaint under the Railway Labor Act the Supreme Court said:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197, 58 S.Ct. 507, 82 L.Ed. 745. (Footnotes omitted.)

Conley v. Gibson, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). The Supreme Court has indicated the same position should be taken as to § 1983 complaints. See

Schauer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-252, 106 S.Ct. 2505, 2510-2512, 91 L.Ed.2d 202 (1986), this Court set forth the following standard of review to be applied on a motion for summary judgment:

> Again, in Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which 'it would be open to a jury . . . to infer from the circumstances' that there had been a meeting of the minds. Id., at 158-159, 90 S.Ct., at 1608, 1609.
>
> Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As Adickes, supra, and Cities Service, supra, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Cities Service, supra, at 290, 88 S.Ct., at 1592, summary judgment may be granted.
>
> That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made, [footnote omitted] the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.' [Footnote omitted.] And, as we noted above, Rule 56(c) provides that

the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact. [Footnote omitted.] The inquiry performed is the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-480, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Wilkerson v. McCarthy, 336 U.S. 53, 62, 69 S.Ct. 413, 417, 93 L.Ed. 497 (1949). As the Court long ago said in Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:

> 'Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly, it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Footnotes omitted.)

See also Pleasants v. Fant, 22 Wall. 116, 120-121, 22 L.Ed. 780 (1875); Coughran v. Bigelow, 164 U.S. 301, 307, 17 S.Ct. 117, 119, 41 L.Ed. 442 (1896); Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 343, 53 S.Ct. 391, 394, 77 L.Ed. 819 (1933).

> The Court has said that summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party.' Sartor v. Arkansas Gas Corp., 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944). And we have noted that the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.' Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed.2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Implicit in this standard of review is the requirement that a reviewing court must consider the evidentiary materials submitted by a nonmoving party in opposition to a motion for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In the absence of such consideration, a reviewing court would not have sufficient information to apply properly the standard of review on a motion for summary judgment.

In the present case, Ms. Harris was thrown out of court even though her amended complaint met the notice pleading requirements of the Federal Rules of Civil Procedure. Ms. Harris was thrown out of court even though she was never given an opportunity to ascertain through discovery whether the linkage she thinks may exist actually does with respect to her conspiracy claims under § 1985(3). Ms. Harris was thrown out of court even though Judge Weinshienk never ruled on Ms. Harris' Rule 56(f) affidavit requesting additional time to complete discovery. Ms. Harris was thrown out of court even though

Judge Weinshienk refused to consider the evidentiary materials submitted by Ms. Harris in response to the motion for partial summary judgment filed by American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman. Ms. Harris was thrown out of court even though American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman withheld the March 28, 1988 memorandum from discovery by Ms. Harris until after Ms. Harris' § 1985(3) claims against these defendants had been dismissed by Judge Weinshienk. Ms. Harris was thrown out of court even though Judge Weinshienk refused to consider the evidentiary materials tendered by Ms. Harris in response to Judge Weinshienk's May 17, 1991 request for briefs from the parties.

In affirming Judge Weinshienk's illegal actions and inactions, Judge Moore made the following ruling on the consideration, or lack thereof, given to the evidentiary materials submitted by Ms. Harris on appeal:

> As we have already recognized, plaintiff's allegations of conspiracy fall far short of the level of specificity required to state a claim under § 1985(3). Her evidentiary showing in response to the summary judgment motion did not correct the deficiency. Plaintiff objects that the district court did not properly consider the depositions and related exhibits she submitted in opposition to the motion, but plaintiff did not even attempt to identify any particular testimony or evidentiary item in support of her case. The district court explained to counsel:
>
> > I would be happy to have something pointed to me in the depositions. When depositions are used in motions for summary judgment, . . . the deposition is not thrown at the judge. The pages and lines are given so that we can see what is referred to. That's the only way that depositions can be used in this type of motion.
>
> Aplt. App. at 175. Plaintiff now supplies us with the record she claims the district court disregarded, but again provides no particularized citations to support her conspiracy claims.

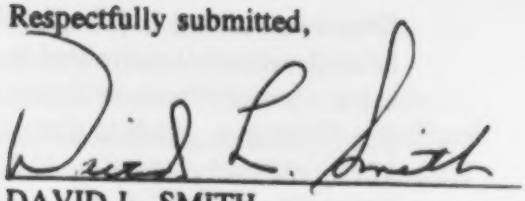
> [Footnote omitted.] Like the district court, we do not sift through materials submitted in bulk to determine whether there exists some dormant evidence supporting a party's assertions. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024-25 (10th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992)(No. 92-581); S.E.C. v. Thomas, 965 F.2d 825, 827 (10th Cir. 1992).

However, Judge Moore has failed to acknowledge the critical fact that not just some, but all of the evidentiary materials submitted by Ms. Harris support her conspiracy claims under § 1985(3), as well as her discriminatory and retaliatory discharge claims under § 1981. Under these circumstances, Ms. Harris was under no obligation to provide "particularized citations" or otherwise limit the evidentiary materials to be considered by Judge Moore or Judge Weinshienk. Thus, while Ms. Harris denies that she failed to provide any "particularized citations" in support of her case, or that any depositions were "thrown" at Judge Weinshienk, the fact remains that because of their failure to consider any of the evidentiary materials submitted by Ms. Harris, Judge Moore and Judge Weinshienk were without sufficient information to apply properly the standard of review on a motion for summary judgment or to dismiss Ms. Harris' civil rights case.

CONCLUSION

Based on the foregoing argument, the court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision. Ms. Harris therefore requests this Court to grant her petition for a writ of certiorari to the court of appeals.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDNA RUTH HARRIS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 91-1354
	)	(D.C. No. 90-Z-758)
AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,	)	(D.Colo.)
	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT*

Before MOORE and TACHA, Circuit Judges, and SAFFELS,** Senior District Judge.

**Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Edna Harris was employed as a licensed practical nurse by defendant Presbyterian/Saint Luke's Medical Center (P/SL) on July 13, 1981. In late 1984, she was suspended for three days following an incident with a patient. As a result, plaintiff, who is black, filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). Shortly thereafter, P/SL filed two complaints against her with the Colorado Board of Nursing. Eventually, plaintiff filed a civil rights action under 42 U.S.C. § 1981 and the Thirteenth Amendment against P/SL and defendant Jeanne Coakley Beethe, alleging both discriminatory suspension and retaliation. See Aplt. App. Vol. X, tab 20 (Complaint in D.C. No. 85-K-1987). The district court granted summary judgment, and this court affirmed on appeal. See Harris v. Presbyterian/Saint Luke's Medical Ctr., No. 91-1125 (10th Cir. Nov. 6, 1991).

In the meantime, P/SL was acquired by defendant American Medical International (AMI), and plaintiff was terminated for threatening to retaliate against complaining patients. She then brought the present action under 42 U.S.C. § 1981, § 1985(3), and § 1986, alleging her termination was the result of a conspiracy motivated by racial discrimination and retaliation. The case was disposed of in three stages. On September 19, 1990, the district court dismissed all claims against P/SL and Ms. Beethe for lack of any allegations indicating their role in the conspiracy or the events complained of. Aplt. App. Vol. I at 167, 168-70 (bench ruling on motions to dismiss). On January 29, 1991, the district court granted summary judgment for the remaining defendants on plaintiff's claims under §§ 1985(3) and 1986, citing both (1) the absence of facts or factual allegations supporting the conclusory assertion of conspiracy, and (2) the intracorporate character of the alleged conspiracy. Id. at 172, 173-74 (bench ruling on motion for partial summary judgment). Finally, on September 9, 1991, the district court entered an order dismissing plaintiff's § 1981 claim for discriminatory and retaliatory discharge in reliance on Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Aplt. App. Vol. I at 159, 163. On appeal, plaintiff challenges all of these rulings as well as the denial of her motion

under Fed. R. Civ. P. 11 seeking sanctions for untimely compliance with a discovery request. See id.

September 19, 1990, Order

Plaintiff's initial argument is procedural. She contends the district court erred in dismissing the claims against P/SL and Ms. Beethe "without [first] issuing a Rule 6(b) scheduling order limiting the time to complete discovery." Opening Br. at 7. Plaintiff does not explain how the absence of an order limiting discovery would have any bearing on a motion to dismiss, much less does she cite pertinent authority in support of her position. Furthermore, P/SL notes the issue was not even raised in opposition to the motion to dismiss. Answer Br. of P/SL at 3. Indeed, the district court's docket reveals that plaintiff filed a motion for a scheduling order under Rule 16(b)--which was promptly granted--only after the district court dismissed the claims against P/SL and Ms. Beethe. This issue is meritless. See generally Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992).

Next, plaintiff specifically challenges the district court's dismissal of her § 1985(3) conspiracy claim against P/SL and Ms. Beethe.[1] In essence, she argues that under the principle of notice pleading, recitation of the statutory language coupled with a reference to adverse employment actions suffices to state a § 1985(3) claim--even against defendants not included in the operative allegations. See Opening Br. at 8-10; Aplt. App. Vol. I at 1, 2 (paragraphs 2 and 4 of the complaint). We agree with the district court that plaintiff's conclusory allegations of conspiracy lack the supporting factual detail

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[1] Here and elsewhere plaintiff's conspiracy claims shall be referred to collectively. We note, however, that unlike plaintiff's allegations of racially discriminatory discharge, which potentially implicate preexisting substantive rights under the Thirteenth Amendment, see Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985), the retaliatory discharge claim involves a right created by Title VII of the Civil Rights Act, which cannot be redressed under § 1985(3), see Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 336, 372, 376-78 (1979); Long v. Laramie County Community College Dist., 840 F.2d 743, 752 (10th Cir.), cert. denied, 488 U.S. 825 (1988).

necessary to sustain a claim for relief. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991) (conclusory allegation of conspiracy in connection with adverse employment action insufficient to state a claim under § 1985(3)); see also Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (plaintiff must provide "specific facts showing agreement and concerted action" to sustain civil rights conspiracy claim); Clulow v. Oklahoma, 700 F.2d 1291, 1296, 1303 (10th Cir. 1983) (conclusory allegation of conspiracy without supporting factual events insufficient to state claim).

As a last resort, plaintiff maintains that she was entitled, in any event, to amend her (already amended) complaint to cure the noted pleading deficiency and, therefore, the district court erred in dismissing the conspiracy claims with prejudice. However, plaintiff does not assert, nor does the record show, that she actually submitted or sought leave to submit such a curative amendment. Accordingly, the district court's final disposition of the matter was proper under the circumstances. See Glenn v. First Nat'l Bank, 868 F.2d 368, 369-71 (10th Cir. 1989).

January 30, 1991, Order

Plaintiff raises a number of procedural and substantive objections to the district court's ruling on the intracorporate nature of the alleged conspiracy among the remaining defendants. See Opening Br. at 10-18. As already noted, however, that ruling was just one of two alternative rationales given for dismissing these conspiracy claims. Before the district court turned to the "even more important reason" for dismissal provided by the intracorporate conspiracy principle, which is an unsettled matter in this circuit, see, e.g., Wilhelm v. Continental Title Co., 720 F.2d 1173, 1175 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984), the district court emphasized the conclusory character of the conspiracy allegations generally, and concluded that plaintiff had failed to establish any conspiracy (of whatever nature) with the requisite specificity. Aplt. App. Vol. I at 173. Because we agree with this assessment, we leave the intracorporate conspiracy question for another day and discuss only those matters pertinent to the former, more fundamental and less controversial, rationale for disposition of the case.

As we have already recognized, plaintiff's allegations of conspiracy fall far short of the level of specificity required to state a claim under § 1985(3). Her evidentiary showing in response to the summary judgment motion did not correct the deficiency. Plaintiff objects that the district court did not properly consider the depositions and related exhibits she submitted in opposition to the motion, but plaintiff did not even attempt to identify any particular testimony or evidentiary item in support of her case. The district court explained to counsel:

> I would be happy to have something pointed to me in the depositions. When depositions are used in motions for summary judgment, . . . the deposition is not thrown at the judge. The pages and lines are given so that we can see what is referred to. That's the only way that depositions can be used in this type of motion.

Aplt. App. at 175. Plaintiff now supplies us with the record she claims the district court disregarded, but again provides no particularized citations to support her conspiracy claims.[2] Like the district court, we do not sift through materials submitted in bulk to determine whether there exists some dormant evidence supporting a party's assertions. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024-25 (10th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-581); S.E.C. v. Thomas, 965 F.2d 825, 827 (10th Cir. 1992).

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[2] The only citation to a relatively specific item submitted in opposition to summary judgment refers to an interrogatory response from AMI addressing only the legal relationship between P/SL and AMI. See Opening Br. at 15-16 (citing Aplt. App. Vol. I at 152-54). We note that plaintiff also cites to a set of answers she gave to questions posed by the magistrate judge. Id. (citing Aplt. App. Vol. I at 113-133). However, in addition to involving simply another indiscriminate reference to some eighteen pages of testimony, this material was prepared after summary judgment had been granted on the § 1985(3) claims.

Plaintiff also contends the district court erred by granting summary judgment over her objection, pursuant to Fed. R. Civ. P. 56(f), that she had not yet completed discovery. We review the decision whether to grant additional time for discovery, under a deferential, abuse of discretion standard. Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984). Plaintiff asserts that much of the evidence necessary to establish her claims was in defendants' possession, and emphasizes that discovery was not yet completed when the district court granted summary judgment.[3] Neither of these points is sufficient to mandate continuance of the summary judgment proceedings. See Guthrie v. Sawyer, 970 F.2d 733, 738 (10th Cir. 1992); Jones v. City & County of Denver, 854 F.2d 1206, 1211 (10th Cir. 1988). We consider it significant that when plaintiff commenced this case, she already possessed the depositions of some of the defendants, which had been taken in her first employment discrimination action against P/SL, and that another fourteen months passed before summary judgment was granted here. Cf. Culver v. Town of Torrington, 930 F.2d 1456, 1459 (10th Cir. 1991) (four-month period following motion provided sufficient time for discovery for purposes of Rule 56(f)). Under the circumstances, we do not think the district court abused its discretion by resolving the conspiracy claims on summary judgment, particularly in light of plaintiff's failure properly to utilize the substantial existing record to present to the district court specific facts in support of her conspiracy allegations. See Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981) (when plaintiff fails to produce specific facts to support conspiracy allegations, district court may, in its discretion, refuse to permit discovery and grant summary judgment).

September 9, 1991, Order

Following the issuance of recent decisions by this court regarding the effect of Patterson v. McLean Credit Union, 491 U.S. 164, on the limited availability of § 1981 in the employment discrimination context, the district court ordered briefing on whether

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[3] However, the pertinent formal cut-off date, i.e., for nonexpert, factual discovery, was only one month away at the time. See Opening Br. at 12 (citing discovery scheduling order).

plaintiff's § 1981 claims for discriminatory and retaliatory discharge remained actionable. We agree with its subsequent conclusion that, under Patterson and this court's post-Patterson decisions, they are not.

Plaintiff's claim for discriminatory discharge is precluded by Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 975-76 (10th Cir. 1991). As for the retaliatory discharge claim, we note that "[t]he right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." Carter v. Sedgwick County, 929 P.2d 1501, 1504 (10th Cir. 1991) (quoting Patterson, 491 U.S. at 177-78) (emphasis added). The "enforcement" action by plaintiff allegedly prompting her discharge was the filing of an EEOC charge and subsequent lawsuit for (1) discriminatory suspension and (2) general racial harassment, see Aplt. App. Vol. X, tabs 19, 20, neither of which involves contract rights implicating § 1981 protections. See, e.g., Hill v. Goodyear Tire Rubber, Inc., 918 F.2d 877, 880 (10th Cir. 1990) (claim for racial harassment not actionable under 1981); Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1052 (7th Cir. 1991) (after Patterson, claims for wrongful suspension do not give rise to § 1981 liability). Consequently, retaliation for such action likewise does not fall within the ambit of § 1981. Hill, 918 F.2d at 880; Riel v. Reed, 760 F. Supp. 852, 854 (D. Colo. 1991); accord Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1535 (11th Cir.), cert. denied, 111 S. Ct. 353 (1990).

Plaintiff seeks to circumvent the cited authorities on the retaliation claim by the following three-step argument: (1) the discrimination she suffered was contrary to policies and procedures of her employer, (2) under state law, such policies and procedures may be accorded the status of contract rights, and (3) therefore, her EEOC charge and suit constituted, in effect, the use of legal process to enforce the kind of specific contract rights still recognized as protected under § 1981. Opening Br. at 23. We express no opinion on the merits of this line of argument, as it was not asserted before the district court. See Neu v. Grant, 548 P.2d 281, 287 (10th Cir. 1977).

Plaintiff has, however, raised an even more radical argument to disassociate her § 1981 retaliation claim from the adverse precedents discussed above. Noting that those cases delimit only the

right to make and enforce contracts and do not deal with the other protected interests established by the statute, particularly the right to sue, be parties, and give evidence, and the entitlement to full and equal benefit of the laws, see Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989), plaintiff contends she has a cause of action to redress the burden (retaliatory termination) allegedly placed on her use of legal process, which existing case law does not undercut. However, plaintiff is not able to cite any case law directly in her favor either. For the reasons that follow, we need not decide whether such a claim exists in the present context, for plaintiff's pleadings would be deficient in any event.

The problem with plaintiff's claim here is that it ignores the single, most fundamental concern of § 1981. Whatever else the statute may or may not require, there can be no actionable violation unless the conduct complained of was motivated by intentional racial, or similar class-based, discrimination. See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982). Thus, for example, where the Supreme Court recognized a cause of action against unions for interfering with minority members, right to pursue grievances with their employer, the Court noted that the unions had "categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks, knowing that the employer was discriminating in violation of the contract." Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987). In short, the unions not only hampered pursuit of legal process against management, they specifically and deliberately did so only with respect to minority grievances. Here, in contrast, while plaintiff claims she was terminated in retaliation for pursuing legal process against her employer, she did not allege that defendants' motive in this connection was specifically racial, i.e., that it went beyond retaliation per se. As it happens, the underlying grievances were for discrimination, but "[i]t is not true that 'a retaliatory response by an employer against [an employee] who genuinely believed in the merits of his or her [discrimination] complaint would inherently be in the nature of a racial situation. . . . An employer could have a policy of firing any employee who made legal trouble for it on any ground.'" Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (citation omitted). The racial nature of an underlying grievance might well provide circumstantial evidence that a subsequent retaliatory response was also

racially motivated. Nevertheless, the latter allegation must first expressly and clearly be made before any claim under § 1981 is even stated. In our judgment, that was not done here.

Lest our insistence on the distinctive, definitive element of a § 1981 claim appear unduly harsh, we emphasize that there already exists a remedy for the kind of retaliation that has been alleged here. Termination in response for filing discrimination charges is specifically proscribed by § 704(a) of Title VII, 42 U.S.C. §§ 2000e-3(a). Consequently, there is good reason not to adopt a tortuous or idiosyncratic construction of § 1981 simply to provide some remedy for the retaliatory conduct defendants allegedly engaged in. See Trujillo, 928 F.2d at 976; Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

Finally, plaintiff challenges the district court's refusal to impose sanctions under Rule 11 in connection with the belated production of a document requested in discovery. We review this decision only for an abuse of discretion. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992). The district court's order provides a full and fair analysis of counsel's reasonable conduct in this matter. Aplt. App. at 159-62. Furthermore, while the document in question refers to both completed and contemplated disciplinary action against plaintiff, noting her history of employment dissatisfaction, insubordination, and allegedly abusive behavior with patients, it does not reflect or suggest a racially motivated conspiracy, which of course is the cornerstone of the § 1985(3) claim plaintiff sought to have reinstated. It was not an abuse of discretion to deny the requested sanction.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDNA RUTH HARRIS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 91-1354
	)	
AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE;	)	
	)	
Defendants-Appellees.	)	

ORDER

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and SAFFELS, *Senior District Judge.

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*Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter is before the court on appellant's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original

disposition was correct. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to which the case was submitted, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By:

Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., WALTER WEISMAN, WALTER GEORGE, DAVID GORE, SHIRLEY HOFFMAN, PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER, and JEANNE COAKLEY BEETHE,

Defendants.

ORDER OF DISMISSAL OF CERTAIN DEFENDANTS

This matter was before the Court on September 19, 1990, for oral argument on defendant Presbyterian/Saint Luke's Medical Center's Motion To Dismiss Amended Complaint and defendants, American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman, and Jeanne Coakley Beethe's Motion To Dismiss. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that defendant Presbyterian/Saint Luke's Medical Center's Motion To Dismiss Amended Complaint is granted. It is

FURTHER ORDERED that the Complaint and cause of action are dismissed with prejudice as to defendant Presbyterian/Saint Luke's Medical Center. It is

FURTHER ORDERED that the Motion to Dismiss of defendants American Medical International, Inc., Walter Weisman,

Walter George, David Gore, Shirley Hoffman, and Jeanne Coakley Beethe is granted only as to plaintiff's claims against defendant Jeanne Coakley Beethe, and is denied as to all other claim. It is

FURTHER ORDERED that the Complaint and cause of action are dismissed with prejudice as to said defendant.

DATED at Denver, Colorado, this 19th day of September, 1990.

BY THE COURT:

ZITA L. WEINSHIENK, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN,

Defendants.

ORDER DISMISSING CERTAIN CLAIMS

This matter was before the Court on January 29, 1991, for oral argument on defendants' Motion For Partial Summary Judgment. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated herein by reference as if fully sat forth. Accordingly, it is

ORDERED that defendants' Motion For Partial Summary Judgment is granted. It is

FURTHER ORDERED that plaintiff's claim based on 42 U.S.C. § 1985(3) is dismissed with prejudice. It is

FURTHER ORDERED that plaintiff's claim based on 42 U.S.C. § 1986 is dismissed with prejudice. It is

FURTHER ORDERED that the case will proceed only on the 42 U.S.C. § 1981 claim.

DATED at Denver, Colorado, this 30th day of January, 1991.

BY THE COURT:

_____

ZITA L. WEINSHIENK
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., WALTER WEISMAN, WALTER GEORGE, DAVID GORE, and SHIRLEY HOFFMAN,

Defendants.

ORDER DENYING MOTION FOR SANCTIONS AND DISMISSING ACTION

The matters before the Court are Plaintiff's Motion For Sanctions Pursuant To Fed. R. Civ. P. 11 And Request To Stay Discovery and this Court's sua sponte determination of whether plaintiff has stated a claim upon which relief may be granted, in view of recent rulings by the United States Court of Appeals For The Tenth Circuit. Jurisdiction is appropriate under 28 U.S.C. § 1331.

On May 10, 1991, plaintiff filed her Amended Complaint and Jury Demand, in which she asserted claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, arising from plaintiff's June 6, 1988, discharge from employment as a licensed practical nurse. By Order of Dismissal of Certain Defendants, dated September 19, 1990, the Court dismissed defendant Presbyterian/Saint Luke's Medical Center, as well as defendant Jeanne Coakley Beethe. At that time, the Court denied defendants' motion to dismiss to the extent it was based on the assertion that, after Patterson v. McLean Credit Union, 491 U.S. 164 (1989), discriminatory and retaliatory discharge were not actionable under 42 U.S.C. § 1981. After a hearing on January 19, 1991, the

Court granted defendant's Motion For Partial Summary Judgment and dismissed plaintiff's claims brought under 42 U.S.C. §§ 1985(3) and 1986. Plaintiff's § 1981 claim based on alleged discriminatory and retaliatory discharge is her only remaining claim.

I. Plaintiff's Motion For Sanctions

Plaintiff has moved for sanctions against Defendant American Medical International, Inc. (AMI) and its attorney Richard L. Thorgren based on their failure to reasonably inquire into the existence of a document when responding to plaintiff's document production requests. Plaintiff claims the document, produced an March 1, 1991, was critical to her 42 U.S.C. § 1985 claim, dismissed by this Court on January 29, 1991.

Pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 602.A., this motion was referred to Magistrate Judge Richard M. Borchers for the purpose of making a recommendation to the Court. A hearing was hold before Magistrate Borchers on April 2, 1991. On April 9, 1991, the Magistrate filed a Recommendation Of United States Magistrate Judge, in which he recommended that plaintiff's motion for sanctions under Rule 11 be denied, and that this Court sua sponte reconsider the dismissal of plaintiff's 42 U.S.C. § 1985 claim, in view of the production of the new document.

Plaintiff has filed objections to the Magistrate's recommendation. Pursuant to 28 U.S.C. § 636(b)(1), the Court must make a de novo determination of those portions of the Magistrate's Recommendation to which objections are made.

The subject document is a March 28, 1988, memorandum from David J. Gore to J. Rock Tonkel concerning an anonymous letter attributed to plaintiff. Although plaintiff made requests for documents on September 27, 1990, and December 10, 1990, the memorandum was not delivered to plaintiff until March 1, 1991. In its November 27, 1990, and December 20, 1990, responses to plaintiff's first and second requests for production of documents, AMI stated that it would make available for copying and inspection the personnel records of, among others, Shirley Hoffman, and would produce all documents relating to the decision to terminate plaintiff and to the facts and reasons which formed the basis for that decision. The first

response was signed by both Richard Thorgren and Thomas Sawicki, Senior Vice President of AMI. The second response was signed by Richard Thorgren. On January 21, 1991, Richard Thorgren assured plaintiff that all the requested documents, with the exception of those to which AMI objected, had been delivered to plaintiff.

At the hearing before the Magistrate, AMI's counsel indicated that he delivered the memorandum to plaintiff as soon as it was provided to him and that he was unaware of its existence prior to that time. The Magistrate concluded that AMI could not be liable under Rule 11, because there was no evidence showing that AMI or an agent of AMI withheld the memorandum. Additionally, the Magistrate determined that because plaintiff provided no evidence that Mr. Thorgren know of the existence of the memorandum, Rule 11 sanctions were not appropriate. The Magistrate did not address plaintiff's motion to stay discovery.

In her objections, plaintiff correctly argues that Rule 11 sanctions may be imposed for a failure to make a "reasonable inquiry" into whether the signed pleading, motion, or other paper is grounded in fact. Fed. R. Civ. P. 11 states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact .
> . . .

However, plaintiff has failed to present any convincing evidence that AMI, one of its agents, or Mr. Thorgren failed to make a reasonable inquiry into the existence of the March 28, 1988, memorandum. The fact that the memorandum was in the personal possession of defendant Shirley Hoffman does not in and of itself establish that AMI failed to make a reasonable inquiry into its existence. Misplacement of papers is a common occurrence, and it is not unusual for a person to be unable to remember each document generated over a number of years.

Similarly, the fact that AMI's counsel had his paralegal gather the documents requested by plaintiff, does not establish that he failed

to make a reasonable inquiry into the existence of the memorandum. There is no evidence that the paralegal was instructed other than to produce all the relevant documents AMI had provided Mr. Thorgren, or that Mr. Thorgren did not properly ask AMI to produce the requested documents. The evidence indicates that when the memorandum was located, it was provided to Mr. Thorgren, who immediately disclosed it to plaintiff's counsel.

This Court dismissed plaintiff's conspiracy claim brought under 42 U.S.C. § 1985, because it concluded that the claim was barred by the intra-corporate conspiracy doctrine. Therefore, the production of the memorandum is not relevant to the Court's prior holding and does not necessitate reconsideration of Defendants' Motion For Partial Summary Judgment.

II. Plaintiff's Claims of Discriminatory and Retaliatory Discharge

On May 17, 1991, the Court sua sponte issued a minute order requesting the parties to file briefs analyzing the effect on this case of the recent opinions of the United States Court Of Appeals For The Tenth Circuit, Trujillo v. Grand Junction Regional Center, 928 F.2d 973 (10th Cir. 1991), and Carter v. Sedgwick County, 929 F.2d 1501 (10th Cir. 1991), in which the Tenth Circuit held that discriminatory discharge is not actionable under 42 U.S.C. § 1981. Additionally, the Court referred the parties to a recent order of this Court, Brito v. AT&T, 90-Z-53 (D.Colo. April 25, 1991), holding that retaliatory discharge is not actionable under 42 U.S.C. § 1981. The Court reserved ruling on Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial. Briefs were filed on May 21, 1991. The Court has reviewed the parties' briefs and plaintiff's request to present six volumes of evidentiary materials and determined that oral argument would not materially assist the Court in determining this purely legal issue.

The United States Court Of Appeals For The Tenth Circuit has ruled that discriminatory discharge is not actionable under 42 U.S.C. § 1981, because it does not involve conduct which impairs the right to enforce contract obligations. See, Trujillo v. Grand Junction Regional Center, 928 F.2d 973 (10th Cir. 1991), and Carter v. Sedgwick County, 929 F.2d 1501 (10th Cir. 1991). Although this Court may not agree with the conclusion that discharge does not impair the right to

enforce contract obligations, this Court is bound to follow Tenth Circuit law. Although the Tenth Circuit has not expressly ruled that retaliatory discharge is not actionable, plaintiff has not presented any argument that retaliatory discharge should be treated differently than discriminatory discharge. Moreover, the Tenth Circuit's analysis regarding discriminatory discharge appears to apply to retaliatory discharge as well; both types of discharge occur after initial formation of the contract at issue. Accordingly, the Court determines that 42 U.S.C. § 1981 does not protect individuals from retaliatory discharge. For the reasons stated above, it is

ORDERED that Plaintiff's Motion For Sanctions Pursuant To Fed. R. Civ. P. 11 is denied. It is

FURTHER ORDERED that plaintiff's Request To Stay Discovery is moot. It is

FURTHER ORDERED that the claims brought under 42 U.S.C. § 1981 are dismissed, and this cause of action is dismissed with prejudice. It is

FURTHER ORDERED that Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial is moot.

DATED at Denver, Colorado, this 9th day of September, 1991.

BY THE COURT:

_____

ZITA L. WEINSHIENK
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

vs.

AMERICAN MEDICAL INTERNATIONAL, Inc., et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motions to Dismiss: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:55 a.m., on the 19th day of September, 1990, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

DAVID L. SMITH, Attorney at Law, 1630 Welton Street, Suite 300, Denver, Colorado 80202, appearing for the plaintiff.

HARDING & OGBORN, by RICHARD L. THORGREN, Attorney at Law, 1200 17th Street, Denver, Colorado 80202, appearing for Defendants American Medical, Weisman, George, Gore, Hoffman and Beethe.

KUTAK ROCK & CAMPBELL, by TANA K. SIMARD, Attorney at Law, Suite 2400, 707 17th Street, Denver, Colorado 80202, appearing for Defendant Presbyterian/Saint Luke's.

(The arguments of counsel are not herein transcribed, pursuant to the direction of ordering counsel. The following proceedings were then had and entered of record:)

RULING

THE COURT: The motion to dismiss the 1981 action, allegations of discharge based on both retaliation and discrimination, will be denied. This court's ruling is that the Tenth Circuit--I'm sorry--the Eighth Circuit, which is the sister circuit to the Tenth, really has the better reasoning on the question of Patterson. And if one indeed just reads Patterson, Patterson just simply does not cover the situation of a discriminatory discharge. It's an area that is not addressed.

So that motion will be denied, except the Court will further find that there are no specific allegations concerning defendant Beethe; and the motion to dismiss Defendant Beethe will be granted, and that defendant will be stricken and dismissed from the complaint.

As to the 1982--as to the 1985 action, and 1986 also goes along with it, we have notice pleading, and there are only certain exceptions to notice pleading. And one of the exceptions to notice pleading is when you allege a 1985 action. And the Tenth Circuit court, in Lessman v. McCormick has said very specifically--and I believe there is some other cases--I'm not familiar with the one that Mr. Smith is referring to--it says that the complaint must allege facts showing a conspiracy; it is not enough that conclusions are alleged.

This has been the law in many other circuits; and I would cite for the record Slotnick v. Stavinsky, which is 560 F.2d 31, a First Circuit, 1977 case, wherein the court on page 33 indicated that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with reference to material facts. That's in the context of a conspiracy action.

And in Robinson v. McCorkle, 462 F.2d 111, a Third Circuit case, the complaint must be dismissed when there are only broad conclusory allegations.

It has long been the law in this circuit and in others--and I intend to follow this law, and I have in the past followed it--that when you're pleading a 1985 complaint, you must allege facts, not conclusions. Facts have not been alleged. There hasn't been anything in the complaint to say what the facts were concerning Presbyterian/Saint Luke's. In fact, they're not even mentioned by name in the complaint, nor is Defendant Beethe.

Accordingly, the Court will at this time grant the motion of Presbyterian/Saint Luke's to dismiss Presbyterian/Saint Luke's form the case. There is no 1981 claim against Presbyterian/Saint Luke's, and the Court specifically finds that there are no facts alleged in the complaint to support a claim under section 1985.

I quite frankly believe also that--and I don't have to face the issue--that were we to look at the state bar, when Presbyterian/Saint Luke's was liquidated, that probably would be a good bar in this action against them. Certainly we do look to state law for many factors involved in a--in 1985 or in Federal claims; and where the entity was liquidated and another entity replaced them, I think that probably would bar the initial entity, although that issue will not be the basis for my determination because this is a motion to dismiss and not a motion for summary judgment.

Now, let me just say one more thing: I am going to allow AMI to file a motion for summary judgment if they want to concerning the 1985 claim. I would say to Mr. Smith that maybe you should look at the law carefully and decide whether you want to concede this issue, because as you're well aware, an attorney may not pursue a claim that does not have a basis in the law after investigation.

But in any case, let's have a--whatever you think appropriate, a motion for summary judgment as to the 1985 claim.

There also is very strong law, Mr. Smith, and I'm sure you're aware of it, that says that a corporation cannot conspire with employees. That's just clear law in the Tenth Circuit. Unless the employees have some individual interest, some personal gain that they might make, they cannot conspire with a corporation, with their employer corporation. And again, there is many, many cases in the

Tenth Circuit on that point and in many other circuits. I think that's pretty much the law all over.

So if that's a basis for a motion to dismiss the conspiracy claim also, this is something that should be considered, because I think the law is clear in that regard. But we'll take that up when the time comes.

For the time being, the Court will deny American Medical International's motion to dismiss the 1981 claims based on both discriminatory and retaliatory discharge and will grant Presbyterian/Saint Luke's motion to dismiss Presbyterian/Saint Luke's from the case and will also dismiss all claims against Defendant Beethe, for failure to state any claims specifically against her.

We'll proceed, then, on the remaining claims at least at this point, till we review any further motions for summary judgment.

Thank you.

MR. THORGREN: Thank you, your Honor.

MS. SIMARD: Thank you, your Honor.

(Thereupon, the hearing was concluded and the Court recessed at 9:30 a.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript form the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 27th day of November, 1991.

_____

Paul A. Zuckerman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

vs.

AMERICAN MEDICAL INTERNATIONAL, Inc., et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motion for Partial Summary Judgment)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m., on the 29th day of January, 1991, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

DAVID L. SMITH, Attorney at Law, 1630 Welton Street, Suite 300, Denver, Colorado 80202, appearing for the plaintiff.

HARDING & OGBORN, by RICHARD L. THORGREN, Attorney at Law, 1200 17th Street, Denver, Colorado 80202, appearing for Defendants American Medical, Weisman, George, Gore, and Hoffman.

(The arguments of counsel are not herein transcribed, pursuant to the direction of ordering counsel. The following proceedings were then had and entered of record:)

RULING

THE COURT: Plaintiff has her 1981 action. There is no question about hat. The issue is whether she can bring a 1985(3) and a 1986 action in this case.

In the Tenth Circuit, in the case of Lessman v. McCormick, which is 591 F.2d 605, a 1979 case, the Tenth Circuit, in a case which involved a physician's staff privileges at a hospital, indicates that the complaint must allege facts showing a conspiracy against the plaintiff because of her membership in a class. In other words, 1985 cases cannot rely on notice pleading. They have to allege facts.

In this case, the only fact that I can see really alleged in the complaint concerning the conspiracy was that the plaintiff was fired. Otherwise, we have conclusion, conclusory allegations, that defendants engaged in a conspiracy with each other, etc., without alleging facts. I don't think the allegations of the complaint comply with the requirements in Lessman v. McCormick that in this type of action, facts must be alleged showing the conspiracy. Just the fact that she was fired--that one fact is not enough to sustain the conspiracy.

But this claim must be dismissed for an even more important reason. It is clear that the Tenth Circuit has not ruled on intra-corporate conspiracy; but many other circuits have, as pointed out. The Sixth, the Fourth, the Eighth, which is our sister circuit, the Seventh all required that two or more persons must conspire, and it's not satisfied by employees in one corporation.

The plaintiff's attorney is arguing that we have two corporations because it started out as Presbyterian/Saint Luke's, which now is dismissed from the case, which was bought out by AMI. But basically, we're talking about one corporation taking over another corporation. I suppose one could argue that there was an instantaneous point of time where one corporation was being taken over where there may have been two corporations, rather than one; but I don't believe Plaintiff's attorney can rest on that.

What is being asserted in the complaint is that many employees of a corporation did, in fact, talk together; that there was,

as stated by the defendant, corporate policy requiring people to go up the chain, so we do have talks and actions among employees; and that simply is not what is required by case law to show a conspiracy.

Personal reasons are not that somebody doesn't like somebody at work. That's just not a personal reason. That's employee-related. A personal reason does not mean that they were upset because she asserted herself in the employment context. That's employee-related. We're talking about the cases which say there is an exception if there is some personal reasons such as an individual outside the employment scope will gain some advantage if indeed someone is fired. That's a personal reason; that they seek to gain something outside the scope of employment within a personal context, not because they're mad at somebody, not because they don't like somebody. That's not what is discussed by the case law.

The plaintiff is just--plaintiff's position is just not convincing that there is a conspiracy which meets the requirements of the case law that there were people outside the corporation. There is no indication of that. There is no indication that there was some personal reasons that they had to gain something individually outside the corporate context, outside of the employment context. No indication of that whatsoever.

I would be happy to have something pointed to me in the depositions. When depositions are used in motions for summary judgment, Mr. Smith, the deposition is not thrown at the judge. The pages and lines are given so that we can see what is referred to. That's the only way that depositions can be used in this type of a motion.

But I've listened carefully to what Plaintiff's attorney has said, and there has been nothing said that convinces me other than that we have a intra-corporate conspiracy claim, which all the circuits who have decided the issue have said is not sufficient for 1985(3) claim. The Tenth Circuit hasn't ruled on it. I'm confident that they would rule with the trend in the majority of the circuits.

Accordingly, that claim and that claim only, as well as the claim that is attached with it, the 1986 claim, because if the 1985(3) claim is no good, neither is the 1986 claim--will be dismissed.

The motion for partial summary judgment will be granted, and the case will proceed on what appears to be the proper claim in this case, which is a 1981 claim. And if there is evidence of conspiracy under 1981, I'm sure it will come in. But it won't come in under 1985(3).

The motion for partial summary judgment is granted. The 1985(3), 1986 claims are dismissed. The case will continue on the 1981 claim.

If there is any room for resolving this case, I hope the attorneys will resolve it; and if not, the case will ultimately be heard and resolved by a jury on the proper claim, which is the 1981 claim.

Anything further?

MR. THORGREN: No, your Honor.

THE COURT: Court will be in recess, and we'll get started with the jury trial very shortly.

(Thereupon, the hearing was concluded and the Court recessed at 9:35 a.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript form the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 27th day of November, 1991.

PAUL A. ZUCKERMAN

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1985

. . .

(3) If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injury any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

(2)

92-1721

No. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

EDNA HARRIS,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

BRIEF OF PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MEDICAL CENTER

May 21, 1993

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

EDNA HARRIS,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

BRIEF OF PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner, Edna Harris, is a black citizen of the United States who was employed by Presbyterian/Saint Luke's Medical Center ("P/SL") from July 13, 1981 to September 24, 1985. The assets of P/SL were sold to American Medical International, Inc. ("AMI") on September 24, 1985. Ms. Harris continued to be employed with AMI until June of 1988 when AMI terminated

Ms. Harris from her employment. Ms. Harris sought legal and equitable relief under 42 U.S.C. §§1981, 1985(3) and 1986, and the Thirteenth Amendment to the Constitution of the United States.

In the caption of the Amended Complaint, P/SL is identified as a Co-Defendant. However, Ms. Harris fails to mention P/SL by name in any allegation of the Amended Complaint. Ms. Harris alleges that

> "Between November 1, 1984 and July 1, 1988, the Defendants engaged in a conspiracy with each other and with unknown third persons for the purpose of depriving, either directly or indirectly, the Plaintiff, or a class of black persons, of equal protection of the laws, or of equal privileges and immunities under the law." (1a)

Although Ms. Harris directs certain allegations toward "the Defendants" Ms. Harris specifically confines her factual allegations to the alleged wrongs of "Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore and Shirley Hoffman."

P/SL filed its Motion to Dismiss the Amended Complaint (4a) on the grounds (among others) that the Amended Complaint did not contain any specific factual allegations of the existence of a

conspiracy with the specificity required to survive a motion to dismiss.

On September 19, 1990, the Honorable Zita L. Weinshienk, Judge, of the United States District Court for the District of Colorado, held a hearing on P/SL's Motion to Dismiss. Judge Weinshienk granted the Motion to Dismiss stating:

> "And one of the exceptions to notice pleading is when you allege a 1985 action. And the Tenth Circuit court, in Lessman v. McCormack has said very specifically .. and I believe there is some other cases .. I'm not familiar with the one that Mr. Smith is referring to .. it says that the complaint must allege facts showing a conspiracy; it's not enough that the conclusions are alleged." (8a)

On appeal, the United States Court of Appeals for the Tenth Circuit agreed with Judge Weinshienk stating in part:

> "We agree with the district court that plaintiff's conclusionary allegations of conspiracy lack the supporting factual detail necessary to sustain a claim for relief. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991) (conclusory allegation of conspiracy in connection with adverse employment action insufficient to state a claim under §1985(3));

see also Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (plaintiff must provide 'specific facts showing agreement with concerted action' to sustain civil rights conspiracy claim); Clulow v. Oklahoma, 700 F.2d 1291, 1296, 1303 (10th Cir. 1983) (conclusory allegation of conspiracy without supporting factual events insufficient to state claim)." (12a)

SUMMARY OF ARGUMENT

The United States Court of Appeals has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for exercise of this Court's power of supervision.

ARGUMENT

While this Court has the judicial discretion to grant a Petition for Writ of Certiorari when the United States Court of Appeals departs from the accepted and usual course of judicial proceedings, or sanctions such departure by a lower court, in this case Ms. Harris makes no showing that such departure from the accepted and usual course of judicial proceedings has occurred. To the contrary, the United States Court of Appeals in deciding this case followed its

earlier decisions. As an example, in Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989), the Court held:

> "Plaintiff alleged defendants conspired to deprive plaintiff of his constitutional rights. Because plaintiff failed to allege specific facts showing agreement and concerted action among defendants, the district court properly dismissed the conspiracy claim with prejudice. See Sooner Prods. Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983). Conclusionary allegations of conspiracy are insufficient to state a valid §1983 claim."

Similarly, in Drake v. The City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991), the United States Court of Appeals dismissed the plaintiff's §1985(3) claim stating:

> "We have examined the complaint carefully and hold that the allegations of the complaint are not specific enough to provide any independent source to support a §1985(3) claim. See Clulow v. Oklahoma, 700 F.2d 1291, 1303 (10th Cir. 1983)."

Ms. Harris, cites as authority for her position Lessman v. McCormick, 591 F.2d 605, 611-12 (10th Cir. 1979) (Ms. Harris' Brief, Pages 7 and 8). In Lessman, the complaint alleged a conspiracy among all defendants to deny plaintiff equal protection of the

law and to injure her property and person. Judge Weinshienk relied upon Lessman when she dismissed the claim of Ms. Harris against P/SL. Lessman specifically held:

> "The complaint must allege facts showing a conspiracy against plaintiff 'because of' her membership and class and that the criteria defining a 'class were invidious'. Harrison v. Brooks, 519 F.2d 1358, 1360 (1st Cir. 1975)."

The language quoted from Lessman, supra, in the Brief of Ms. Harris relates to the question of whether the plaintiff should be allowed to attempt to develop through discovery specific facts which would support her conspiracy allegation. In Lessman, supra, however, the court had found the allegations of the complaint were sufficient to pass the specificity test. The court stated:

> "All that is alleged against the defendants other than White and Reynolds is that they conspired together and caused the arrest and detention. No specific facts are set out connecting them to the arrest. Even so we think there is sufficient here to pass the applicable liberal construction test. Specific facts are stated with respect to the officer forcing plaintiff to stay at police headquarters until the bank employee arrived."

It is clear that Lessman, supra, is consistent with the other authorities that are cited in this brief to the effect that Ms. Harris must allege with specificity the facts to support her allegation of a conspiracy.

Other circuits of the United States Court of Appeals have reached a similar conclusion. In Slotnick v. Stavisky, 560 F.2d 31 (1st Cir. 1977), the court stated:

> "In an effort to control frivolous conspiracy suits under §1983, federal courts have come to insist that the complaint state with specificity the facts that, in plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts. Dunn v. Gazola, 216 F.2d 709, 711 (1st Cir. 1954); Kadar Corp. v. Millbury, 549 F.2d 230 (1st Cir. 1977); Fletcher v. Hook, 446 F.2d 14 (3rd Cir. 1971); Johnson v. Stone, 268 F.2d 803 (7th Cir. 1959); Ellingburg v. King, 490 F.2d 1270 (8th Cir. 1974); Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972). This rule might have been applied with profit to this case. The complaint contains frequent references to conspiracy, but it offers few insights into the specific nature of the alleged concerted action."

See also, Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972), where the court stated:

> "With near unity the courts have rejected complaints containing mere conclusory allegations of deprivations of constitutional rights protected under §1985(3). 'A conspiracy claim based upon §1985(3) requires a clear showing of invidious, purposeful and intentional discrimination between the classes or individuals. Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959); Colon v. Grieco, 226 F.Supp. 414 (D.N.J. 1964); Selico v. Jackson, 201 F.Supp. 475 (S.D. Cal. 1962).' Daly v. Pedersen, 278 F.Supp. 88 (D.Minn. 1967); Weise v. Reisner, 318 F.Supp. 580, 583 (E.D. Wis. 1970). Cf. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1970)."

CONCLUSION

The question presented for review by Ms. Harris that the United States Court of Appeals has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court is simply not the case. The United States Court of Appeals has followed its earlier decisions and the decisions of other

circuits that claims of conspiracy must be alleged with specificity for such claims to survive a motion to dismiss. Presbyterian/St. Luke's Medical Center respectfully requests this Court deny the Petition for Writ of Certiorari.

CLANAHAN, TANNER, DOWNING AND KNOWLTON, P.C.

By: Jack D. Henderson

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

EDNA HARRIS,

Petitioner,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

APPENDIX TO BRIEF OF PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MEDICAL CENTER

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Defendants.

AMENDED COMPLAINT AND JURY DEMAND

COMES NOW the Plaintiff, Edna Harris, and files the following Amended Complaint against the above-named Defendants:

1. This is a suit for legal and equitable relief under 42 U.S.C. §§1981, 1985(3), and 1986, and the Thirteenth Amendment to the Constitution of the United States. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §§1331 and 1343.

2. Between November 1, 1984 and July 1, 1988, the Defendants engaged in a conspiracy with each other and with unknown third persons for the purpose of depriving, either directly or indirectly, the Plaintiff, or a class of Black persons, of equal protection of the laws, or of equal privileges and immunities under the laws. One or more persons engaged in the conspiracy did, or caused to be done, an act in furtherance of the object of such conspiracy, whereby the Plaintiff was injured in her person or property, or deprived of having and exercising a right or privilege of a citizen of the United States. Specifically, Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore and Shirley Hoffman terminated the Plaintiff from her employment as a licensed practical nurse on or about June 6, 1988 because of her race

(Black), as evidenced by racial comments, harassment, and retaliation; subjective termination criteria; and other facts and circumstances indicating that the Plaintiff was denied the equal protection of the laws.

3. Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman, having knowledge that the wrongs conspired to be done were about to be committed, and having power to prevent or aid in preventing the commission of the same, neglected or refused to do so.

4. Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore, and Shirley Hoffman deprived the Plaintiff of the same right in the State of Colorado to make and enforce contracts, to sue, be a party, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and subjected the Plaintiff to punishment, pains, penalties, and exactions not imposed on white citizens. Specifically, these Defendants terminated the Plaintiff from her employment as a licensed practical nurse on or about June 6, 1988 in retaliation for the Plaintiff having filed a charge of racial discrimination against Presbyterian/Saint Luke's Medical Center with the Equal Employment Opportunity Commission and in retaliation for the Plaintiff having filed and pursued a civil rights action for racial discrimination and retaliation against Presbyterian/Saint Luke's Medical Center and T. Jeanne Coakley in the United States District Court for the District of Colorado.

5. At all times relevant to the claims alleged in paragraph 1-4, supra, the Defendants were acting intentionally and in reckless and callous indifference to the Plaintiff's federally protected rights.

WHEREFORE, the Plaintiff requests to be reinstated into the position of licensed practical nurse with all lost salary, back pay, front pay, and benefits; all actual and compensatory damages, including damages for pain and suffering, emotional and mental distress, and lost good name, reputation, honor, and integrity; punitive damages against each of the Defendants; expungement of all negative references to the Plaintiff contained in the records of American Medical International, Inc., Presbyterian/Saint Luke's Medical Center, and the Colorado Board of Nursing; interest and costs, including attorney's fees under 42 U.S.C. §1988; and such other and further relief as the Court and jury deem appropriate.

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF THE CLAIMS FOR RELIEF ALLEGED IN THE FOREGOING AMENDED COMPLAINT.

Respectfully submitted,

David L. Smith
Attorney for Plaintiff
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

Plaintiff's address:

3452 Josephine Street
Denver, Colorado 80205

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 1990, a true and correct copy of the foregoing Amended Complaint and Jury Demand was hand delivered to the following:

Prentice Hall Corporation Systems, Inc.
1400 Glenarm Place, Third Floor
Denver, Colorado

Walter George
1834 Gilpin Street
Denver, Colorado

Shirley Hoffman
801 East 19th Avenue
Denver, Colorado

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Defendants.

MOTION TO DISMISS AMENDED COMPLAINT
AND JURY DEMAND

Defendant Presbyterian/Saint Luke's Medical Center ("PSL"), by and through its counsel, Kutak Rock & Campbell, respectfully moves this Court, pursuant to Rule 12(b)(6), Fed.R.Civ.P. to dismiss Plaintiff's Amended Complaint and Jury Demand in the above-captioned matter for failure to state a claim upon which relief can be granted.

1. Defendant PSL was served with a copy of Plaintiff's Amended Complaint and Jury Demand (the "Amended Complaint") on or about May 14, 1990. Plaintiff's Amended Complaint purports to request legal and equitable relief under 42 U.S.C. §§ 1981, 1985(3) and 1986, and the Thirteenth Amendment to the Constitution of the United States (Amended Complaint, ¶ 1).

2. Plaintiff alleges as the basis for each of these claims that between November 1, 1984, and July 1, 1988, Defendants American Medical International, Inc. ("AMI"), Walter Weisman, Walter George, David Gore and Shirley Hoffman engaged in a conspiracy with each other to terminate Plaintiff from her employment at AMI as a licensed practical nurse, effective June 6, 1988, because of her race (Amended Complaint, ¶¶ 2 through 5).

3. Plaintiff's Amended Complaint fails to allege facts sufficient to allow the Court to conclude that Plaintiff has a legal right to relief against PSL. Although Plaintiff makes a blanket allegation against all defendants in paragraph 2 of the Amended Complaint, not one specific factual allegation is directed against PSL. Since conclusory allegations are not sufficient to survive a motion to dismiss when no facts are alleged to support the conclusion, Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977), the Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed under Rule 12(b)(6), Fed.R.Civ.P.

4. Plaintiff's claim for relief under 42 U.S.C. § 1981 also fails to state a claim for relief and must be dismissed. Section 1981, which grants all persons the same right to make and enforce contracts as is enjoyed by white citizens, prohibits racial discrimination in the making and enforcement of private contracts. Where, as here, the alleged acts of discrimination do not involve the impairment of the specific rights to "make" or to "enforce" contracts, Section 1981 provides no relief. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). Because Plaintiff in this case alleges post-contract formation discriminatory conduct, Section 1981 is not applicable and that claim for relief must be dismissed.

5. Plaintiff's claim for relief under 42 U.S.C. § 1985(3) fails to state a claim for relief and must be dismissed. To state a claim under 42 U.S.C. § 1985(3), a complaint must allege the existence of five elements:

> 1) conspiracy; 2) motivated by "racial or perhaps otherwise class-based invidious discriminatory animus"; 3) "for the purpose of depriving either directly , or indirectly, any person or class of persons of equal protection of laws, or equal privileges and immunities under the laws"; 4) that the conspirator committed some act in furtherance of the conspiracy; and 5) that the plaintiff was either "injured in his person or property" or was "deprived of having and exercising any right or privilege of a citizen of United States."

Sager v. Woodland Park, 543 F. Supp. 282, 291 (D. Colo. 1982) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)). Because Plaintiff in this case fails to allege that PSL engaged in a conspiracy, and because PSL, as a matter of law, could not possibly have engaged in the alleged conspiracy, Section 1985(3) is not applicable and that claim for relief must be dismissed.

6. Plaintiff's claim for relief under 42 U.S.C. § 1986 fails to state a claim for relief and must be dismissed. It is axiomatic that a cause of action under Section 1986 is premised on the violation of Section 1985. Accordingly, where the Plaintiff cannot maintain a claim under Section 1985, a claim under Section 1986 must fail as well. Milton v. Wilson, 607 F. Supp. 510 (D. Colo. 1985). Because Plaintiff's claim under Section 1985 fails to state a claim upon which relief can be granted, Plaintiff's claim under Section 1986 must also be dismissed.

7. On September 29, 1988, PSL submitted, to the District Court, City and County of Denver, State of Colorado, its application for judicially supervised liquidation (the "Application"). On October 17, 1988, the District Court issued an order (the "Order") commencing the dissolution proceedings. The Order, among other things, fixed March 3, 1989 as the last day for the filing of claims against PSL and held that "creditors and claimants who fail to file a Proof of Claim on or before such date shall be barred from participating in the distribution of the assets of the Corporations." Plaintiff's claim, which has not been filed with the District Court, and which, in any event, was not filed prior to the bar date, must be dismissed as being untimely. C.R.S. § 7-8-120.

WHEREFORE, Defendant PSL respectfully requests that Plaintiff's Amended Complaint and Jury Demand be dismissed, with prejudice, and that the Court grant to PSL its reasonable costs, attorneys' fees and such other and further relief as the Court deems just and equitable, as set forth herein and as will be further detailed in the Brief in Support of its Motion to Dismiss, which PSL, by separate motion, has requested leave of this Court to file.

Respectfully submitted this 4th day of June, 1990.

KUTAK ROCK & CAMPBELL

By:_____
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Attorneys for Defendant
Presbyterian/Saint Luke's
Medical Center

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 1990, service of the foregoing MOTION TO DISMISS AMENDED COMPLAINT AND JURY DEMAND was effected by placing true and correct copes thereof in the United States mail, postage prepaid, addressed to the following:

David L. Smith, Esq.
1630 Welton Street
Suite 300
Denver, CO 80202

Richard L. Thorgren, Esq.
Harding and Ogborn
1200 Seventeenth Street
Denver, CO 80202

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA HARRIS,

Plaintiff,

vs.

AMERICAN MEDICAL INTERNATIONAL, Inc., et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motions to Dismiss: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:55 a.m., on the 19th day of September, 1990, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

DAVID L. SMITH, Attorney at Law, 1630 Welton Street, Suite 300, Denver, Colorado 80202, appearing for the plaintiff.

HARDING & OGBORN, by RICHARD L. THORGREN, Attorney at Law, 1200 17th Street, Denver, Colorado 80202, appearing for Defendants American Medical, Weisman, George, Gore, Hoffman and Beethe.

KUTAK ROCK & CAMPBELL, by TANA K. SIMARD, Attorney at Law, Suite 2400, 707 17th Street, Denver, Colorado 80202, appearing for Defendant Presbyterian/Saint Luke's.

(The arguments of counsel are not herein transcribed, pursuant to the direction of ordering counsel. The following proceedings were then had and entered of record:)

RULING

THE COURT: The motion to dismiss the 1981 action, allegations of discharge based on both retaliation and discrimination, will be denied This court's ruling is that the Tenth Circuit--I'm sorry--the Eighth Circuit, which is the sister circuit to the Tenth, really has the better reasoning on the question of Patterson. And if one indeed just reads Patterson, Patterson just simply does not cover the situation of a discriminatory discharge. It's an area that is not addressed.

So that motion will be denied. Except the Court will further find that there are no specific allegations concerning defendant Beethe; and the motion to dismiss Defendant Beethe will be granted, and that defendant will be stricken and dismissed from the complaint.

As to the 1982--as to the 1985 action, and 1986 also goes along with it, we have notice pleading, and there are only certain exceptions to notice pleading. And one of the exceptions to notice pleading is when you allege a 1985 action. And the Tenth Circuit court, in Lessman v. McCormick has said very specifically--and I believe there is some other cases--I'm not familiar with the one that Mr. Smith is referring to--it says that the complaint must allege facts showing a conspiracy; it is not enough that conclusions are alleged.

This has been the law in many other circuits; and I would cite for the record Slotnick v. Stavinsky, which is 560 F.2d 31, a First Circuit, 1977 case, wherein the court on page 33 indicated that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with reference to material facts. That's in the context of a conspiracy action.

And in Robinson v. McCorkle, 462 F.2d 111, a Third Circuit case, the complaint must be dismissed when there are only broad conclusory allegations.

It has long been the law in this circuit and in others--and I intend to follow this law, and I have in the past followed it--that when you're pleading a 1985 complaint, you must allege facts, not conclusions. Facts have not been alleged. There hasn't been

anything in the complaint to say what the facts were concerning Presbyterian/Saint Luke's. In fact, they're not even mentioned by name in the complaint, nor is Defendant Beethe.

Accordingly, the Court will at this time grant the motion of Presbyterian/Saint Luke's to dismiss Presbyterian/Saint Luke's form the case. There is no 1981 claim against Presbyterian/ Saint Luke's, and the Court specifically finds that there are no facts alleged in the complaint to support a claim under section 1985.

I quite frankly believe also that--and I don't have to face the issue--that were we to look at the state bar, when Presbyterian/Saint Luke's was liquidated, that probably would be a good bar in this action against them. Certainly we do look to state law for many factors involved in a--in 1985 or in Federal claims; and where the entity was liquidated and another entity replaced them, I think that probably would bar the initial entity, although that issue will not be the basis for my determination because this is a motion to dismiss and not a motion for summary judgment.

Now, let me just say one more thing: I am going to allow AMI to file a motion for summary judgment if they want to concerning the 1985 claim. I would say to Mr. Smith that maybe you should look at the law carefully and decide whether you want to concede this issue, because as you're well aware, an attorney may not pursue a claim that does not have a basis in the law after investigation.

But in any case, let's have a--whatever you think appropriate, a motion for summary judgment as to the 1985 claim.

There also is very strong law, Mr. Smith, and I'm sure you're aware of it, that says that a corporation cannot conspire with employees. That's just clear law in the Tenth Circuit. Unless the employees have some individual interest, some personal gain that they might make, they cannot conspire with a corporation, with their employer corporation. And again, there is many, many cases in the Tenth Circuit on that point and in many other circuits. I think that's pretty much the law all over.

So if that's a basis for a motion to dismiss the conspiracy claim also, this is something that should be considered, because I think the law is clear in that regard. But we'll take that up when the time comes.

For the time being, the Court will deny American Medical International's motion to dismiss the 1981 claims based on both discriminatory and retaliatory discharge and will grant Presbyterian/Saint Luke's motion to dismiss Presbyterian/Saint Luke's from the case and will also dismiss all claims against Defendant Beethe, for failure to state any claims specifically against her.

We'll proceed, then, on the remaining claims at least at this point, till we review any further motions for summary judgment.

Thank you.

MR. THORGREN: Thank you, your Honor.

MS. SIMARD: Thank you, your Honor.

(Thereupon, the hearing was concluded and the Court recessed at 9:30 a.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript form the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 27th day of November, 1991.

_____

Paul A. Zuckerman

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDNA RUTH HARRIS, Plaintiff-Appellant, v. AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE, Defendants-Appellees.	)	No. 91-1354 (D.C. No. 90-Z758) (D.Colo.)

ORDER AND JUDGMENT*

Before MOORE and TACHA, Circuit Judges, and SAFFELS**, Senior District Judge.

**Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3

Plaintiff Edna Harris was employed as a licensed practical nurse by defendant Presbyterian/Saint Luke's Medical Center (P/SL) on July 13, 1981. In late 1984, she was suspended for three days following an incident with a patient. As a result, plaintiff, who is black, filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). Shortly thereafter, P/SL filed two complaints against her with the Colorado Board of Nursing. Eventually, plaintiff filed a civil rights action under 42 U.S.C. § 1981 and the Thirteenth Amendment against P/SL and defendant Jeanne Coakley Beethe, alleging both discriminatory suspension and retaliation. See Aplt. App. Vol. X, tab 20 (Complaint in D.C. No. 85-K-1987). The district court granted summary judgment, and this court affirmed on appeal. See Harris v. Presbyterian/Saint Luke's Medical Ctr, No. 91-1125 (10th Cir. Nov. 6, 1991).

In the meantime, P/SL was acquired by defendant American Medical International (AMI), and plaintiff was terminated for threatening to retaliate against complaining patients. She then brought the present action under 42 U.S.C. § 1981, § 1985(3) and § 1986, alleging her termination was the result of a conspiracy motivated by racial discrimination and retaliation. The case was disposed of in three stages. On September 19, 1990, the district court dismissed all claims against P/SL and Ms. Beethe for lack of any allegations indicating their role in the conspiracy or the events complained of. Aplt. App. Vol. I at 167, 168-70 (bench ruling on motions to dismiss). On January 29, 1991, the district court granted summary judgment for the remaining defendants on plaintiff's claims under §§ 1985(3) and 1986, citing both (1) the absence of facts or factual allegations supporting the conclusory assertion of conspiracy, and (2) the intracorporate character of the alleged conspiracy. Id. at 172, 173-74 (bench ruling on motion for partial summary judgment). Finally, on September 9, 1991, the district court entered an order dismissing plaintiff's §1981 claim for discriminatory and retaliatory discharge in reliance on Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Aplt. App. Vol. I at 159, 163. On appeal, plaintiff challenges all of these rulings as well as the denial of her motion under Fed. R. Civ. P. 11 seeking sanctions for untimely compliance with a discovery request. See id.

September 19, 1990, Order

Plaintiff's initial argument is procedural. She contends the district court erred in dismissing the claims against P/SL and Ms. Beethe "without [first] issuing a Rule 6(b) scheduling order limiting the time to complete discovery." Opening Br. at 7. Plaintiff does not

explain how the absence of an order limiting discovery would have any bearing on a motion to dismiss, much less does she cite pertinent authority in support of her position. Furthermore, P/SL notes the issue was not even raised in opposition to the motion to dismiss. Answer Br. of P/SL at 3. Indeed, the district court's docket reveals that plaintiff filed a motion for scheduling order under Rule 16(b)--which was promptly granted--only after the district court dismissed the claims against P/SL and Ms. Beethe. This issue is meritless. See generally Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992).

Next, plaintiff specifically challenges the district court's dismissal of her § 1985(3) conspiracy claim against P/SL and Ms. Beethe.[1] In essence, she argues that under the principle of notice pleading, recitation of statutory language coupled with a reference to adverse employment actions suffices to state a § 1985(3) claim--even against defendants not included in the operative allegations. See Opening Br. at 8-10; Aplt. App. Vol. I at 1, 2 (paragraphs 2 and 4 of the complaint). We agree with the district court that plaintiff's conclusory allegations of conspiracy lack the supporting factual detail necessary to sustain a claim for relief. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1159, 1162-63 (10th Cir. 1991) (conclusory allegation of conspiracy in connection with adverse employment action insufficient to state a claim under § 1985(3)); see also Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989) (plaintiff must provide "specific facts showing agreement and concerted action" to sustain civil rights conspiracy claim); Clulow v. Oklahoma, 700 F.2d 1291, 1296, 1303 (10th Cir. 1983) (conclusory allegation of conspiracy without supporting factual events insufficient to state claim).

---

[1] Here and elsewhere plaintiff's conspiracy claims shall be referred to collectively. We note, however that unlike plaintiff's allegations of racially discriminatory discharge, which potentially implicate preexisting substantive rights under the Thirteenth Amendment, see Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985), the retaliatory discharge claim involves a right created by Title VII of the Civil Rights Act, which cannot be redressed under § 1985(3), see Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 336, 372, 376-78 (1979); Long v. Laramie County Community College Dist.., 840 F.2d 743, 752 (10th Cir.) cert. denied, 488 U.S. 825 (1988).

As a last resort, plaintiff maintains that she was entitled, in any event, to amend her (already amended) complaint to cure the noted pleading deficiency and, therefore, the district court erred in dismissing the conspiracy claims with prejudice. However, plaintiff does not assert, nor does the record show, that she actually submitted or sought leave to submit such a curative amendment. Accordingly, the district court's final disposition of the matter was proper under the circumstances. See Glenn v. First Nat'l Bank, 868 F.2d 368, 369-71 (10th Cir. 1989).

January 30, 1991, Order

Plaintiff raises a number of procedural and substantive objections to the district court's ruling on the intracorporate nature of the alleged conspiracy among the remaining defendants. See Opening Br. at 10-18. As already noted, however, that ruling was just one of two alternative rationales given for dismissing these conspiracy claims. Before the district court turned to the "even more important reason" for dismissal provided by the intracorporate conspiracy principle, which is an unsettled matter in this circuit, see, e.g., Wilhelm v. Continental Title Co., 720 F.2d 1173, 1175 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984), the district court emphasized the conclusory character of the conspiracy allegations generally, and concluded that plaintiff had failed to establish any conspiracy (of whatever nature) with the requisite specificity. Aplt. App. Vol. I at 173. Because we agree with this assessment, we leave the intracorporate conspiracy question for another day and discuss only those matters pertinent to the former, more fundamental and less controversial, rationale for disposition of the case.

As we have already recognized, plaintiff's allegations of conspiracy fall far short of the level of specificity required to state a claim under § 1985(3). Her evidentiary showing in response to the summary judgment motion did not correct the deficiency. Plaintiff objects that the district court did not properly consider the depositions and related exhibits she submitted in opposition to the motion, but plaintiff did not even attempt to identify any particular testimony or evidentiary item in support of her case. The district court explained to counsel:

> I would be happy to have something pointed to me in the depositions. When depositions are used in motions for summary judgment, . . . the deposition is not thrown at the

> judge. The pages and lines are given so that we can see what is referred to. That's the only way that depositions can be used in this type of motion.

Aplt. App. at 175. Plaintiff now supplies us with the record she claims the district court disregarded, but again provides no particularized citations to support her conspiracy claims.[2] Like the district court, we do not sift through materials submitted in bulk to determine whether there exists some dormant evidence supporting a party's assertion. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024-25 (10th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992 (No. 92-581); S.E.C. v. Thomas, 965 F.2d 825, 827 (10th Cir. 1992).

Plaintiff also contends that the district court erred by granting summary judgment over her objection, pursuant to Fed. R. Civ. P. 56(f), that she had not yet completed discovery. We review the decision whether to grant additional time for discovery, under a deferential, abuse of discretion standard. Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984). Plaintiff asserts that much of the evidence necessary to establish her claims was in defendants' possession, and emphasizes that discovery was not yet completed when the district court granted summary judgment.[3] Neither of these points is sufficient to mandate continuance of the summary judgment proceedings. See Guthrie v. Sawyer, 970 F.2d 733, 738 (10th Cir. 1992); Jones v. City & County of Denver,

---

[2] The only citation to a relatively specific item submitted in opposition to summary judgment refers to an interrogatory response from AMI addressing only the legal relationship between P/SL and AMI. See Opening Br. at 15-16 (citing Aplt. App. Vol. I at 152-54). We note that plaintiff also cites to a set of answers she gave to questions posed by the magistrate judge. Id. (citing Aplt. App. Vol. I at 113-133). However, in addition to involving simply another indiscriminate reference to some eighteen pages of testimony, this material was prepared after summary judgment had been granted on the § 1985(3) claims.

[3] However, the pertinent formal cut-off date, i.e., for nonexpert, factual discovery, was only one month away at the time. See Opening Br. at 12 (citing discovery scheduling order).

854 F.2d 1206, 1211 (10th Cir. 1988). We consider it significant that when plaintiff commenced this case, she already possessed the depositions of some of the defendants, which had been taken in her first employment discrimination action against P/SL, and that another fourteen months passed before summary judgment was granted here. Cf. Culver v. Town of Torrington, 930 F.2d 1456, 1459 (10th Cir. 1991) (four-month period following motion provided sufficient time for discovery for purposes of Rule 56(f). Under the circumstances, we do not think the district court abused its discretion by resolving the conspiracy claims on summary judgment, particularly in light of plaintiff's failure properly to utilize the substantial existing record to present to the district court specific facts in support of her conspiracy allegations. See Contemporary Mission, Inc., v. United States Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981) (when plaintiff fails to produce specific facts to support conspiracy allegations, district court may, in its discretion, refuse to permit discovery and grant summary judgment).

September 9, 1991, Order

Following the issuance of recent decisions by this court regarding the effect of Patterson v. McLean Credit Union, 491 U.S. 164, on the limited availability of § 1981 in the employment discrimination context, the district court ordered briefing on whether plaintiff's § 1981 claims for discriminatory and retaliatory discharge remained actionable. We agree with its subsequent conclusion that, under Patterson and this court's post-Patterson decisions, they are not.

Plaintiff's claim for discriminatory discharge is precluded by Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 975-76 (10th Cir. 1991). As for the retaliatory discharge claim, we note that "[t]he right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." Carter v. Sedgwick County, 929 P.2d 1501, 1504 (10th Cir. 1991) (quoting Patterson, 491 U.S. at 177-78) (emphasis added). The "enforcement" action by plaintiff allegedly prompting her discharge was the filing of an EEOC charge and subsequent lawsuit for (1) discriminatory suspension and (2) general racial harassment, see Aplt. App. Vol. X, tabs 19, 20, neither of which involves contract rights implicating § 1981 protections. See, e.g., Hill v. Goodyear Tire Rubber, Inc., 918 F.2d 877, 880 (10th Cir. 1990) (claim for racial

harassment not actionable under 1981); Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1052 (7th Cir. 1991) (after Patterson, claims for wrongful suspension do not give rise to § 1981 liability). Consequently, retaliation for such action likewise does not fall within the ambit of § 1981. Hill, 918 F.2d at 880; Riel v. Reed, 760 F. Supp. 852, 854 (D. Colo. 1991); accord Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1535 (11th Cir.), cert. denied, 111 S. Ct. 353 (1990).

Plaintiff seeks to circumvent the cited authorities on the retaliation claim by the following three-step argument: (1) the discrimination she suffered was contrary to policies and procedures of her employer, (2) under state law, such policies and procedures may be accorded the status of contract rights, and (3) therefore, her EEOC charge and suit constituted, in effect, the use of legal process to enforce the kind of specific contract rights still recognized as protected under § 1981. Opening Br. at 23. We express no opinion on the merits of this line of argument, as it was not asserted before the district court. See Neu v. Grant, 548 P.2d 281, 287 (10th Cir. 1977).

Plaintiff has, however, raised an even more radical argument to disassociate her § 1981 retaliation claim from the adverse precedents discussed above. Noting that those cases delimit only the right to make and enforce contracts and do not deal with the other protected interests established by the statute, particularly the right to sue, be parties, and give evidence, and the entitlement to full and equal benefit of the laws, see Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989), plaintiff contends she has a cause of action to redress the burden (retaliatory termination) allegedly placed on her use of legal process, which existing case law does not undercut. However, plaintiff is not able to cite any case law directly in her favor either. For the reasons that follow, we need not decide whether such a claim exists in the present context, for plaintiff's pleadings would be deficient in any event.

The problem with plaintiff's claim here is that it ignores the single, most fundamental concern of § 1981. Whatever else the statute may or may not require, there can be no actionable violation unless the conduct complained of was motivated by intentional racial, or similar class-based, discrimination. See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 382-91 (1982). Thus, for example, where the Supreme Court recognized a cause of action against unions for interfering with minority members, right to pursue grievances with their employer, the Court noted that

the unions had "categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks, knowing that the employer was discriminating in violation of the contract." Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987). In short, the unions not only hampered pursuit of legal process against management, they specifically and deliberately did so only with respect to minority grievances. Here, in contrast, while plaintiff claims she was terminated in retaliation for pursuing legal process against her employer, she did not allege that defendants' motive in this connection was specifically racial, i.e., that it went beyond retaliation per se. As it happens, the underlying grievances were for discrimination, but "[i]t is not true that 'a retaliatory response by an employer against [an employee] who genuinely believed in the merits of his or her [discrimination] complaint would inherently be in the nature of a racial situation. . . . An employer could have a policy of firing any employee who made legal trouble for it on any ground.'" Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (citation omitted). The racial nature of an underlying grievance might well provide circumstantial evidence that a subsequent retaliatory response was also racially motivated. Nevertheless, the latter allegation must first expressly and clearly be made before any claim under § 1981 is even stated. In our judgment, that was not done here.

Lest our insistence on the distinctive, definitive element of a § 1981 claim appear unduly harsh, we emphasize that there already exists a remedy for the kind of retaliation that has been alleged here. Termination in response for filing discrimination charges is specifically proscribed by § 704(a) of Title VII, 42 U.S.C. §§ 2000e-3(a). Consequently, there is good reason not to adopt a tortuous or idiosyncratic construction of § 1981 simply to provide some remedy for the retaliatory conduct defendants allegedly engaged in. See Trujillo, 928 F.2d at 976; Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

Finally, plaintiff challenges the district court's refusal to impose sanctions under Rule 11 in connection with the belated production of a document requested in discovery. We review this decision only for an abuse of discretion. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992). The district court's order provides a full and fair analysis of counsel's reasonable conduct in this matter. Aplt. App. at 159-62. Furthermore, while the document in question refers to both completed and contemplated disciplinary action against plaintiff, noting her history of employment dissatisfaction, insubordination, and allegedly abusive behavior with pa-

tients, it

does not reflect or suggest a racially motivated conspiracy, which of course is the cornerstone of the § 1985(3) claim plaintiff sought to have reinstated. It was not an abuse of discretion to deny the requested sanction.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

No. 92-1721

Supreme Court, U.S.
FILED
JUN 28 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

EDNA HARRIS,

Petitioner,

vs.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN MEDICAL INTERNATIONAL, INC., WALTER WEISMAN, WALTER GEORGE, DAVID GORE, SHIRLEY HOFFMAN AND JEANNE COAKLEY BEETHE

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No. 92-1721

In The

Supreme Court of the United States

October Term, 1992

EDNA HARRIS,

Petitioner,

vs.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/SAINT LUKE'S MEDICAL CENTER; JEANNE COAKLEY BEETHE,

Respondents.

On Petition to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS' AMERICAN MEDICAL INTERNATIONAL, INC., WALTER WEISMAN, WALTER GEORGE, DAVID GORE, SHIRLEY HOFFMAN, AND JEANNE COAKLEY BEETHE

STATEMENT OF THE CASE

A. Factual Background.

Ms. Harris, a black licensed practical nurse, was employed at

Presbyterian/St. Luke's Medical Center from 1981 to September 24, 1985. In December of 1984, Jeanne Coakley Beethe, the Petitioner's supervisor, suspended Ms. Harris for three days without pay, as a result of her leaving an elderly patient lying on the floor in her room for over an hour and for not requesting assistance from other hospital personnel in order to return the patient to her bed. The suspension was implemented in compliance with applicable Medical Center procedures.

Shortly thereafter, Ms. Harris was involved in another incident in which she departed her unit without being relieved by another nurse, resulting in the unit being without a licensed professional for a period of time. Ms. Harris also left the keys to the narcotic cart in an unsecured area. In response to a later inquiry, the hospital was advised by the Colorado Board of Nursing to formally report the two incidents. After its investigation, the Colorado Board of Nursing issued a letter of reprimand to Ms. Harris, concluding that she had failed to provide appropriate patient care. Ms. Harris filed suit against Presbyterian/St. Luke's Medical Center and Jeanne Coakley Beethe, contesting the suspension and the report to the Board of Nursing, alleging racial discrimination and retaliation under 42 U.S.C. § 1981. That action was subsequently dismissed on motion for summary judgment.

The assets of Presbyterian/St. Luke's Medical Center were sold to American Medical International, Inc. in September of 1985. Ms. Harris continued to work for the hospital until June of 1988 when, after having received a final letter of warning for insubordination to her supervisor, she was terminated for cause after threatening to retaliate against patients under her care. This suit followed her termination.

B. Procedural Background.

In her amended complaint, Petitioner sought relief under 42 U.S.C. § 1981, contending that her firing was discriminatory and

that it was in retaliation for her filing, some three years earlier, of the racial discrimination charge and lawsuit against Presbyterian/ St. Luke's Medical Center ("PSL") and her former supervisor. Ms. Harris also asserted claims under 42 U.S.C. §§ 1985(3) and 1986, alleging that the Respondents engaged in a conspiracy to deprive her of federally protected rights and that having knowledge of this conspiracy, the Respondents failed to prevent it.

Respondents American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman, and Jeanne Coakley Beethe ("non-PSL Respondents") filed a motion to dismiss pursuant to Fed. R. Civ. P. 12, arguing that the Petitioner's complaint failed to state a cognizable claim for relief in light of this Court's decision in *Patterson v. McClean Federal Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989). Respondent Beethe also asserted that the Petitioner's complaint failed to articulate any basis for claims asserted against her and did not even identify her in any of the allegations. The district court granted the motion to dismiss as it related to Respondent Beethe, but otherwise denied the dismissal motion.

The remaining non-PSL Respondents subsequently filed a motion for partial summary judgment, contending that the § 1985(3) conspiracy claim was barred by the intra-corporate conspiracy doctrine and that dismissal of that claim would also dictate the dismissal of the § 1986 claim, which was dependent upon it.

The trial court granted the motion for partial summary judgment on January 29, 1991, dismissing the §§ 1985(3) and 1986 claims after holding that the amended complaint failed to establish any conspiracy with the requisite specificity, and that the conspiracy claim was barred by the application of the intra-corporate conspiracy principle. Although Petitioner's counsel submitted five volumes of depositions with his response in

opposition to the motion for partial summary judgment, he did not identify even a single question or answer from any of the depositions in support of his legal position.

In May of 1991, the trial court ordered the parties to submit legal briefs regarding the remaining § 1981 claim, in light of recently announced opinions of the Tenth Circuit Court of Appeals. After briefs were submitted by the parties, the trial court subsequently dismissed the remaining claim, holding that discriminatory discharge is not actionable under § 1981 as a matter of law because it does not involve conduct which impairs the right to enforce contractual obligations.

On appeal, the Tenth Circuit Court of Appeals affirmed the trial court's dismissal of the Petitioner's claims, concluding that the Petitioner had failed to specifically articulate the factual basis for the § 1985(3) conspiracy claim and that the § 1981 claim had been properly dismissed in light of the Tenth Circuit opinions in *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* 929 P.2d 1501 (10th Cir. 1991). The appellate court, like the trial court below, refused to sift through volumes of undesignated materials which accompanied the Petitioner's appellate brief.

REASONS FOR DENYING THE WRIT

The Petitioner apparently seeks to have this Court review only the actions below which relate to the dismissal of the conspiracy claim asserted under 42 U.S.C. § 1985(3) and the dependent § 1986 claim. The Petitioner argues that in affirming the dismissal of the conspiracy claims and the actions of the district court the Tenth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Petitioner's arguments are unpersuasive and without legal or factual merit, and accordingly should be rejected.

In ruling that Petitioner's amended complaint failed to allege facts with the specificity required to sustain a claim under § 1985(3), both the trial court and the appellate court applied the appropriate legal standard. It has long been the law in the Tenth Circuit, and elsewhere, that a claim of conspiracy asserted under §1985(3) cannot survive a dismissal motion if it contains merely conclusory allegations of conspiracy which are not supported with references to material facts. *Drake v. City of Fort Collins*, 927 F.2d 1156 (10th Cir. 1991); *Durre v. Dempsey*, 869 F.2d 543 (1989); *Clulow v. Oklahoma*, 700 F.2d 1291 (10th Cir. 1983); *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979). *See also City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650 (8th Cir. 1989); *Slotnick v. Stavisky*, 560 F.2d 31 (1st Cir. 1977); *Robinson v. McCorkle*, 462 F.2d 111 (3d Cir. 1972); *Johnson v. Stone*, 268 F.2d 803 (7th Cir. 1959).

The Petitioner's amended complaint was fatally deficient, in that it failed to articulate, on any level, the factual basis to support a claim of conspiracy. Both courts below properly applied the appropriate legal standard, and their actions cannot be characterized as a departure from the accepted and usual course of judicial proceedings.

The Petitioner's argument that she was denied the opportunity to conduct discovery so as to ascertain the necessary conspiratorial linkage between the Respondents is most curious when considered in conjunction with the Petitioner's argument that the courts below failed to properly consider the volumes of material which were presented to the courts in an effort to avoid dismissal. The Petitioner's argument on this point is disingenuous at best.

In her brief, the Petitioner acknowledges that the depositions of Respondents George, Gore and Hoffman, the persons most directly involved in the termination of Ms. Harris, were available prior to the court's ruling on the motion for partial summary

judgment. Written discovery, which included requests for production of documents, was also completed. The record below shows that the Petitioner not only had ample opportunity to conduct discovery, but that she in fact had completed a significant amount of discovery prior to the trial court's ruling. The Tenth Circuit properly reviewed the trial court's actions, utilizing the deferential, abuse of discretion standard set forth in *Patty Precision v. Brown and Sharpe Mfg. Co.*, 742 F.2d 1260 (10th Cir. 1984). The abuse of discretion standard was properly utilized by the Tenth Circuit in reviewing and affirming the actions of the district court with respect to this discovery issue. *Refac Intern Ltd. v. Hitachi Ltd.*, 921 F.2d 1247 (C.A. Fed. 1990); *Earley v. Champion Intern Corp.*, 907 F.2d 1077 (11th Cir. 1990); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020 (9th Cir. 1990), *cert. denied*, 494 U.S. 1016, 110 S. Ct. 1319 (1990); *Deitchman v. E. R. Squibb & Sons*, 740 F.2d 556 (7th Cir. 1982).

The Petitioner next argues that both the trial court and the appellate court improperly failed to consider the undesignated discovery material tendered to the courts. Such an argument is legally unpersuasive for at least two reasons. As noted by Judge Moore in the Tenth Circuit opinion, neither a trial court nor an appellate court is required to "sift through materials submitted in bulk to determine whether there exists some dormant evidence supporting a party's assertions."

In *Celotex v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986), this Court held that Rule 56(e) of the Federal Rules of Civil Procedure "requires the non-moving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories and admissions on file,' *designate* 'specific facts showing that there is a genuine issue for trial' " (emphasis supplied). *Accord, Thomas v. Wichita Coca Cola Bottling Co.*, 968 F.2d 1022 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 635 (1992); *SEC v. Thomas*, 965 F.2d 825 (10th Cir. 1992).

The Petitioner's argument that she "was under no obligation to provide 'particularized citations' or otherwise limit the evidentiary materials" is a misstatement of existing law, and assumes that courts have both the time and the duty to make the Petitioner's case for her. As has been her pattern in the courts below, the Petitioner here also fails to identify a single fact somewhere buried within the volumes of material submitted to the courts which would have created a factual dispute so as to render summary judgment inappropriate. The simple reality of the situation, and the only conclusion that can be drawn from Petitioner's failure to designate any materials, is that no such facts existed.

Secondly, although the Tenth Circuit Court of Appeals did not address the intra-corporate conspiracy principle, the trial court correctly noted that all of the individual Respondents were employees of the corporate owner of the hospital. While the Tenth Circuit as yet may not have decided the issue, the circuits which have addressed it have held that a conspiracy claim is not properly asserted under § 1985(3) when a single business entity is responsible for an action which results in the impairment of an individual's ability to make or enforce contract rights. As noted by the Eighth Circuit in *Cross v. General Motors Corp.*, 721 F.2d 1152, 1156 (8th Cir. 1983), a corporation and its agents are "a single person in the eyes of the law, and a corporation cannot conspire with itself." *See also Doherty v. American Motors Corp.*, 728 F.2d 334 (6th Cir. 1984); *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972).

There is nothing contained within the undesignated materials furnished to the courts below which would remove Petitioner's claim from the application of the intra-corporate conspiracy doctrine. As a result, dismissal of the conspiracy claim was

appropriate on either ground relied upon by the trial court, and the actions of the Tenth Circuit are certainly not a departure from accepted judicial practice.

The Petitioner's final argument, that a document was withheld during discovery and that the conspiracy claim should be reinstated as a result, is both factually and legally unsound. The trial court made a de novo review of this issue and properly concluded that the document was produced to Petitioner's counsel upon its discovery and that sanctions under Rule 11 were not appropriate. The trial court also specifically noted that the dismissal of the conspiracy claims was predicated, in part, on the intra-corporate conspiracy principle, which legal finding was unaffected by the memorandum.

The Tenth Circuit properly applied the abuse of discretion standard in reviewing the trial court's actions and observed that the document in question did not "reflect or suggest a racially motivated conspiracy, which of course is the cornerstone of the § 1985(3) claim plaintiff sought to have reinstated." In *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 110 S. Ct. 2447 (1990), this Court specifically held that appellate courts should apply an abuse of discretion standard in reviewing all aspects of a district court's Rule 11 determination.

CONCLUSION

The Petitioner has failed to establish any basis for her claim that the appellate court departed from accepted and usual judicial practice. In affirming the judgment entered in favor of Respondents American Medical International, Walter Weisman, Walter George, David Gore, Shirley Hoffman and Jeanne Coakley Beethe, the Tenth Circuit Court of Appeals correctly applied the law to the facts as established in the district court. As a result, these Respondents respectfully request that the Court deny the petition for certiorari.

Respectfully submitted,

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APPENDIX A — ORDER DENYING MOTION FOR SANCTIONS AND DISMISSING ACTION FILED SEPTEMBER 9, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., WALTER QEISMAN, WALTER GEORGE, DAVID GORE, and SHIRLEY HOFFMAN,

Defendants.

ORDER DENYING MOTION FOR SANCTIONS AND DISMISSING ACTION

The matters before the Court are Plaintiff's Motion For Sanctions Pursuant To Fed. R. Civ. P. 11 And Request To Stay Discovery and this Court's *sua sponte* determination of whether plaintiff has stated a claim upon which relief may be granted, in view of recent rulings by the United States Court Of Appeals For The Tenth Circuit. Jurisdiction is appropriate under 28 U.S.C. § 1331.

On May 10, 1991, plaintiff filed her Amended Complaint And Jury Demand, in which she asserted claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, arising from plaintiff's June 6, 1988, discharge from employment as a licensed practical nurse. By Order of Dismissal Of Certain Defendants, dated September 19,

1990, the Court dismissed defendant Presbyterian/Saint Luke's Medical Center, as well as defendant Jeanne Coakley Beethe. At that time, the Court denied defendants' motion to dismiss to the extent it was based on the assertion that, after *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), discriminatory and retaliatory discharge were not actionable under 42 U.S.C. § 1981. After a hearing on January 19, 1991, the Court granted defendant's Motion For Partial Summary Judgment and dismissed plaintiff's claims brought under 42 U.S.C. §§ 1985(3) and 1986. Plaintiff's § 1981 claim based on alleged discriminatory and retaliatory discharge is her only remaining claim.

I. Plaintiff's Motion For Sanctions

Plaintiff has moved for sanctions against Defendant American Medical International, Inc. (AMI) and its attorney Richard L. Thorgren based on their failure to reasonably inquire into the existence of a document when responding to plaintiff's document production requests. Plaintiff claims the document, produced on March 1, 1991, was critical to her 42 U.S.C. § 1985 claim, dismissed by this Court on January 29, 1991.

Pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 602.A., this motion was referred to Magistrate Judge Richard M. Borchers for the purpose of making a recommendation to the Court. A hearing was held before Magistrate Borchers on April 2, 1991. On April 9, 1991, the Magistrate filed a Recommendation Of United States Magistrate Judge, in which he recommended that plaintiff's motion for sanctions under Rule 11 be denied, and that this Court *sua sponte* reconsider the dismissal of plaintiff's 42 U.S.C. § 1985 claim, in view of the production of the new document.

Plaintiff has filed objections to the Magistrate's

recommendation. Pursuant to 28 U.S.C. § 636(b)(1), the Court must make a *de novo* determination of those portions of the Magistrate's Recommendation to which objections are made.

The subject document is a March 28, 1988, memorandum from David J. Gore to J. Rock Tonkel concerning an anonymous letter attributed to plaintiff. Although plaintiff made requests for documents on September 27, 1990, and December 10, 1990, the memorandum was not delivered to plaintiff until March 1, 1991. In its November 27, 1990, and December 20, 1990, responses to plaintiff's first and second requests for production of documents, AMI stated that it would make available for copying and inspection the personnel records of, among others, Shirley Hoffman, and would produce all documents relating to the decision to terminate plaintiff and to the facts and reasons which formed the basis for that decision. The first response was signed by both Richard Thorgren and Thomas Sawicki, Senior Vice President of AMI. The second response was signed by Richard Thorgren. On January 21, 1991, Richard Thorgren assured plaintiff that all the requested documents, with the exception of those to which AMI objected, had been delivered to plaintiff.

At the hearing before the Magistrate, AMI's counsel indicated tht he delivered the memorandum to plaintiff as soon as it was provided to him and that he was unaware of its existence prior to that time. The Magistrate concluded that AMI could not be liable under Rule 11, because there was no evidence showing that AMI or an agent of AMI withheld the memorandum. Additionally, the Magistrate determined tht because plaintiff provided no evidence that Mr. Thorgren knew of the existence of the memorandum, Rule 11 sanctions were not appropriate. The Magistrate did not address plaintiff's motion to stay discovery.

Appendix A

In her objections, plaintiff correctly argues that Rule 11 sanctions may be imposed for a failure to make a "reasonable inquiry" into whether the signed pleading, motion, or other paper is grounded in fact. Fed. R. Civ. P. 11 states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . .

However, plaintiff has failed to present any convincing evidence that AMI, one of its agents, or Mr. Thorgren failed to make a reasonable inquiry into the existence of the March 28, 1988, memorandum. The fact that the memorandum was in the personal possession of defendant Shirley Hoffman does not in and of itself establish that AMI failed to make a reasonable inquiry into its existence. Misplacement of papers is a common occurrence, and it is not unusual for a person to be unable to remember each document generated over a number of years.

Similarly, the fact that AMI's counsel had his paralegal gather the documents requested by plaintiff, does not establish that he failed to make a reasonable inquiry into the existence of the memorandum. There is no evidence that the paralegal was instructed other than to produce all the relevant documents AMI had provided Mr. Thorgren, or that Mr. Thorgren did not properly ask AMI to produce the requested documents. The evidence indicates that when the memorandum was located, it was provided to Mr. Thorgren, who immediately disclosed it to plaintiff's counsel.

Appendix A

This Court dismissed plaintiff's conspiracy claim brought under 42 U.S.C. § 1985, because it concluded that the claim was barred by the intracorporate conspiracy doctrine. Therefore, the production of the memorandum is not relevant to the Court's prior holding and does not necessitate reconsideration of Defendants' Motion For Partial Summary Judgment.

II. Plaintiff's Claims of Discriminatory and Retaliatory Discharge

On May 17, 1991, the Court *sua sponte* issued a minute order requesting the parties to file briefs analyzing the effect on this case of the recent opinions of the United States Court Of Appeals For The Tenth Circuit, *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* 929 F.2d 1501 (10th Cir. 1991), in which the Tenth Circuit held that discriminatory discharge is not actionable under 42 U.S.C. § 1981. Additionally, the Court referred the parties to a recent order of this Court, *Brito v. AT&T,* 90-Z-53 (D. Colo. April 25, 1991), holding that retaliatory discharge is not actionable under 42 U.S.C. § 1981. The Court reserved ruling on Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial. Briefs were filed on May 21, 1991. The Court has reviewed the parties' briefs and plaintiff's request to present six volumes of evidentiary materials and determined that oral argument would not materially assist the Court in determining this purely legal issue.

The United States Court Of Appeals For The Tenth Circuit has ruled that discriminatory discharge is not actionable under 42 U.S.C. § 1981, because it does not involve conduct which impairs the right to enforce contract obligations. *See, Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* 929 F.2d 1501 (10th Cir. 1991). Although this Court may not agree with the conclusion that

discharge does not impair the right to enforce contract obligations, this Court is bound to follow Tenth Circuit law. Although the Tenth Circuit has not expressly ruled that retaliatory discharge is not actionable, plaintiff has not presented any argument that retaliatory discharge should be treated differently than discriminatory discharge. Moreover, the Tenth Circuit's analysis regarding discriminatory discharge appears to apply to retaliatory discharge as well; both types of discharge occur after initial formation of the contract at issue. Accordingly, the Court determines that 42 U.S.C. § 1981 does not protect individuals from retaliatory discharge. For the reasons stated above, it is

ORDERED that Plaintiff's Motion For Sanctions Pursuant To Fed. R. Civ. P. 11 is denied. It is

FURTHER ORDERED that plaintiff's Request To Stay Discovery is moot. It is

FURTHER ORDERED that the claims brought under 42 U.S.C. § 1981 are dismissed, and this cause of action is dismissed with prejudice. It is

FURTHER ORDERED that Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial is moot.

DATED at Denver, Colorado, this 9th day of September, 1991.

BY THE COURT:

s/ Zita L. Weinshienk
ZITA L. WEINSHIENK
United States District Court

APPENDIX B — MINUTE ORDER FILED MAY 17, 1991

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; et al.,

Defendants.

MINUTE ORDER

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: May 17, 1991

In view of the recent opinions of the United States Court of Appeals For The Tenth Circuit, *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991), and *Carter v. Sedgwick County,* No. 89-3005, 1991 WL 45936 (10th Cir. 1991), holding that discriminatory discharge is not actionable under 42 U.S.C. § 1981, it is

ORDERED that the parties shall file briefs analyzing the effect of the recent decisions on this case, on or before May 21, 1991, not to exceed five pages double-spaced. It is

FURTHER ORDERED that the Court reserves ruling on

Appendix B

Plaintiff's Motion To Add Defendants And To Assign Case For Jury Trial.

The parties are additionally referred to page 3 of the attached recent order of this Court in *Brito v. AT&T*, 90-Z-53 (April 25, 1991), which discusses retaliatory discharge, and to *Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877 (10th Cir. 1990).

APPENDIX C — MOTION FOR PARTIAL SUMMARY JUDGMENT FILED DECEMBER 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90 Z 758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC., et al.

Defendants.

The Defendants, by and through counsel of record, respectfully move the Court for the entry of partial summary judgment as to the claims based on 42 U.S.C. § 1985(3) and 1986, and as grounds therefor state as follows:

1. In her Amended Complaint the Plaintiff seeks relief pursuant to 42 U.S.C. §§ 1981, 1985(3) and 1986. The Plaintiff alleges tht her discharge from employment as a licensed practical nurse in July of 1988 was discriminatory and retaliatory, in violation of 42 U.S.C. § 1981.

2. Additionally, the Plaintiff alleges that Defendants American Medical International, Inc., Walter Weisman, Walter George, David Gore and Shirley Hoffman engaged in a conspiracy with each other for the purpose of depriving the Plaintiff of equal protection of laws or of equal privileges and immunities under the laws, in violation of § 1985(3). (Complaint ¶ 2). Finally, the Plaintiff alleges that the Defendants also violated § 1986, by their failure to prevent the wrongs complained of despite having knowledge of the same.

Appendix C

3. A claim for relief under § 1985(3) requires "two or more persons" to have conspired to discriminate by depriving a person of his or her ability to make or enforce a contract. However, in the instant case, the Plaintiff has simply alleged that the corporate defendant, and various officers and employees within the corporate system, engaged in the conspiracy to deprive her of federally protected rights.

4. All of the actions complained of by the Plaintiff involve decisions made and actions taken by a single business entity. For purposes of the conspiracy statute, a corporation and its agents are considered to be a single person, which is incapable of conspiring with itself.

5. It is clear that a claim under § 1986 is dependent upon the existence of cognizable claim under § 1985. Since the defendants could not have engaged in a conspiracy as a matter of law, the dependent claim asserted under § 1986 must also fail.

6. The Defendants rely on the attached Memorandum of Law and affidavits submitted in support of this motion. There are no genuine issues of material fact with respect to the claims based on 42 U.S.C. § 1985(3) and § 1986, and summary judgment on those claims is appropriate.

Denver, Colorado
December 3, 1990

Respectfully submitted,

HARDING & OGBORN

s/ Richard Thorgren
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APPENDIX D — MOTION TO DISMISS DATED JUNE 29, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-Z-758

EDNA RUTH HARRIS,

Plaintiff,

v.

AMERICAN MEDICAL INTERNATIONAL, INC.; WALTER WEISMAN; WALTER GEORGE; DAVID GORE; SHIRLEY HOFFMAN; PRESBYTERIAN/ST. LUKE'S MEDICAL CENTER; and JEANNE COAKLEY BEETHE,

Defendants.

MOTION TO DISMISS

Defendants, American Medical International, Inc., Walter Weisman, Walter George, David Gore, Shirley Hoffman, and Jeananne Coakley Beethe, respectfully move the Court, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss Plaintiff's claim based on 42 U.S.C. § 1981 for failure to state a claim upon which relief can be granted, and to dismiss all claims against Defendant Beethe. As grounds for this Motion, Defendants state:

1. Defendants Walter George, Shirley Hoffman and American Medical Internation, Inc. (AMI), were served with a copy of the Amended Complaint on or about May 10, 1990. Defendants Gore and Beethe were served on about May 16, 1990.

2. Plaintiff's Complaint requests legal and equitable relief

under 42 U.S.C. §§ 1981, 1985(3), 1986, and the Thirteenth Amendment to the Constitution of the United States.

3. Plaintiff alleges that she was unlawfully discharged and that the Defendants conspired with one another to terminate Plaintiff from her job as a licensed practical nurse at AMI because of her race and in retaliation for her having filed a civil rights action for racial discrimination and retaliation against Presbyterian/St. Luke's Medical Center and T. Jeanne Coakley.

4. Plaintiff fails to state a claim for relief under 42 U.S.C. § 1981, and such claim must be dismissed. Claims under § 1981 are limited to those acts of discrimination which impair or impede an individual's specific right to make or enforce a contract. If the discrimination alleged does not impair the making or enforcement of a contract, no relief is available under § 1981. The post-formation act of discharge does not affect an individual's right to make or enforce a contract. *Patterson v. McLean Credit Union,* 109 S. Ct. 2363 (1989). As a result, the Plaintiff has failed to assert a cognizable claim under § 1981.

5. Plaintiff has failed to allege any factual basis for her claims against Defendant Beethe. As Plaintiff is well aware, Defendant Beethe left the employ of Park Manor in August of 1987. The Complaint alleges discriminatory and retaliatory discharge, but Defendant Beethe is conspicuously absent from the allegations in the Complaint. (See Complaint, ¶ 2, 3 and 4). Plaintiff cannot escape dismissal of these claims by the imprecise form of her pleading. *Bryan v. Stillwater Bd. of Realtors,* 578 F.2d 1319, 1321 (10th Cir. 1977).

WHEREFORE, Defendants respectfully move the Court for an Order dismissing Plaintiff's claim under §§ 1981 and

dismissing all claims against Defendant Beethe, and for such other and further relief as the Court deems just and proper.

Denver, Colorado
JUNE 29, 1990

HARDING & OGBORN

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